

**Bond University**

## **DOCTORAL THESIS**

### **Role of Law and Legal Institutions in Cambodia Economic Development: Opportunities to Skip the Learning Curve**

Sok, Siphana

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**ROLE OF LAW AND LEGAL INSTITUTIONS IN CAMBODIA ECONOMIC  
DEVELOPMENT:**

*“Opportunities to Skip the Learning Curve”*

**Thesis Paper**

**Candidate: Mr. Siphana SOK**

**SID: 777058543**

**Degree: Doctor of Philosophy**

**School: School of Law, Bond University**

**Supervisor: Professor Mary Hiscock**

**Date: 15 August 2008**

### **Certification**

I, the undersigned, Sok Siphana, declares that the work presented in the thesis is to the best of my knowledge and belief, original (except as acknowledged in the text) and that the work has not been previously submitted for a degree or diploma at Bond University or any other institution.

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Sok Siphana

SID: 777058543

Degree: Doctor of Philosophy

School: School of Law, Bond University

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## **I. SUMMARY OF THE THESIS**

This thesis advances the view that, in an era of regionalization and globalization, Cambodia, as a least developed country, can deliver sustained economic growth, social stability and development if it can develop a coherent set of economic policies linked to the development of a functional and credible legal system. The scope for ‘catch up’ or ‘skip the learning curve’ is possible provided Cambodia can draw from the experiences - policies, legal system and institutions that have been discovered, tried, tested and refined - of other countries with similar background and with proven track records of rapid economic growth. In the context of Asian economic growth and development over the past 30 years, policy choices have been shown to be crucial for achieving high growth rates. Experience of the high performing economies in Asia over the past decades is the best evidence that those with relatively low income levels are, with the right policy and institutional choices, able to catch up with the richer ones.

The Cambodian experience, tested against four hypotheses (convergence, divergence, differentiation and irrelevance hypotheses), demonstrates a series of complex causal links and effects intertwined between law, economics, politics, history and culture. Arguably, the thesis seeks first to understand, through a multi-dimensional lens, *la problématique* of Cambodia’s long term economic development, and second to provide a long term coherent systemic solutions to the wider issues of nation building.

Certain Cambodia experiences have shown substantive convergence with those of the West or other advanced Asian countries as reflected by the steady economic growth over the past decade. Along that line the degree of catch-up is not only feasible but far exceeds those of other similar countries. Other positive signs of development are prevalent throughout the country. Other Cambodian experiences confirm the economic divergence hypothesis which suggests that Cambodia’s catch-up efforts may be possible, though not necessarily along international best practices, but under the influence of other major different factors typically identified as culture, tradition, history and geo-politics. The overall economic expansion in the last decade has not brought the so-called “quality of growth” where development has had a positive impact on factors such as poverty and inequality, the role of the state, democracy and freedom. The argument in favor of the economic differentiation hypothesis suggests that while there are strong signs of policy catch-up in the area of economic

integration and trade related areas, Cambodia's institutional structures have not fully converged. Culture is another facet confirming this hypothesis.

On the legal side, the Cambodian experience has shown that some legal convergence did occur with the process extensively influenced by Western and successful Asian experiences. The policy shift in the mid 1990s has promoted the process of legal convergence and the legal system had evolved slowly towards being much more rule-based. Other Cambodian legal experiences support the legal differentiation hypothesis which suggests that different parts of the legal system behave differently, with some parts showing signs of convergence and others developing along a more idiosyncratic path. While there are strong signs of catch-up in the area of legislative development, Cambodia's institutional structures and their enforcement mechanisms either have not converged, or worse have persistently resisted change. The trend towards a more market-allocative legal system has not resulted generally in a strengthening of the rule of law.

In sum, the Cambodian experience, while balancing to some extent the convergence and divergence hypotheses, validates the strength and dominance of the *differentiation hypothesis*. The dominance of the differentiation factors explains why Cambodia, while having the necessary ingredients and possibilities to skip the learning curve or leap frog, did experience only a minimum and uneven quantum of the leap frogging process. Nonetheless, taking into account the 'Ground Zero' starting point, the fragile peace and the multiple-fold transition that Cambodia went through since the late 1980s, there is a merit in supporting the argument that Cambodia, as still a post-conflict society and political system, has decently done well, and that the leap frogging process, though minimal, can serve as a foundation pillar for skipping the learning curve in the future. Moving into the future, there is a strong likelihood, if not certainty, of the Cambodian experience inexorably pursuing its path-dependent trajectory well into the next generation affirming in the process the continued validity of the *differentiation hypothesis*. The combined 'push and pull' effect, generated from the constant changes of both external and internal factors, will invariably shape and give credence and authority to the *differentiation hypothesis* confirming the trends and expectations that indeed Cambodia will continue to leap frog, not at a fast pace had the convergence hypothesis be validated, but with a *minimalist* quantum.

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## **Abbreviations and Acronyms**

ACMECS	Ayeyawady Chao Phraya Mekong Economic Cooperation
ADB	Asian Development Bank
AISP	ASEAN Integration System of Preferences
ASEAN	Association of Southeast Asian Nations
AFTA	ASEAN Free Trade Area
APEC	Asia-Pacific Economic Cooperation
ATC	Agreement on Textiles and Clothing
BTA	Bilateral Trade and Intellectual Property Rights Protection Agreement
CAFTA	China-ASEAN Free Trade Area
CAR	Council for Administrative Reform
CC	Constitutional Council
CCJ	Club of Cambodian Journalist
CDC	Council for the Development of Cambodia
CDF	Comprehensive Development Framework
CDP	Cambodian Defenders Project
CDRI	Cambodia Development Research Institute
CEPT	Common Effective Preferential Tariff Agreement
CIDA	Canada International Development Agency
CLJR	Council for Legal and Judiciary Reform
CMDGs	Cambodian Millennium Development Goals
CMEA	Council for Mutual Economic Assistance
CPK	Communist Party of Kampuchea
CPP	Cambodian People's Party
CSD	Council for Social Development
CSES	Cambodia Socio-Economic Survey
DDA	Doha Development Agenda
DK	Democratic Kampuchea
EBA	Everything But Arms
ECCEC	Extraordinary Chambers in the Courts of Cambodia
ECOSOC	Economic and Social Council of the United Nations
EITI	Extractive Industries Transparency Initiative



ELCs	Economic Land Concessions
EPZs	Export Processing Zones
EU	European Union
FDI	Foreign direct investment
FTAs	Free Trade Agreements
FTBC	Foreign Trade Bank of Cambodia
FUNCINPEC	Front uni national pour un Cambodge indépendant, neutre, pacifique, et coopératif
GA	United Nations General Assembly
GATT	General Agreement on Tariffs and Trade
GAP	Governance Action Plan
GDP	Gross domestic product
GMAC	Garment Manufactures Association of Cambodia
GSP	Generalized System of Preferences
HDI	Human Development Index
HiiL	Hague Institute on the Internationalization of Law
HRC	United Nations Human Rights Council
ICORC	International Committee on the Reconstruction of Cambodia
ICSID	International Center for Settlement of Investment Disputes
ICTs	Information and communication technologies
IFC	International Finance Corporation
IFIs	International financial institutions
ILO	International Labour Organisation
IMF	International Monetary Fund
IPRs	Intellectual property rights
IRI	International Republican Institute
ITU	International Telecommunication Union
KR	Khmer Rouge
LAC	Legal Aid of Cambodia
LAC	Labor Arbitration Council
L&D	Law and Development
LDC	Least developed country
LDGs	Law-Dependent Goods
LIC	Low-income country

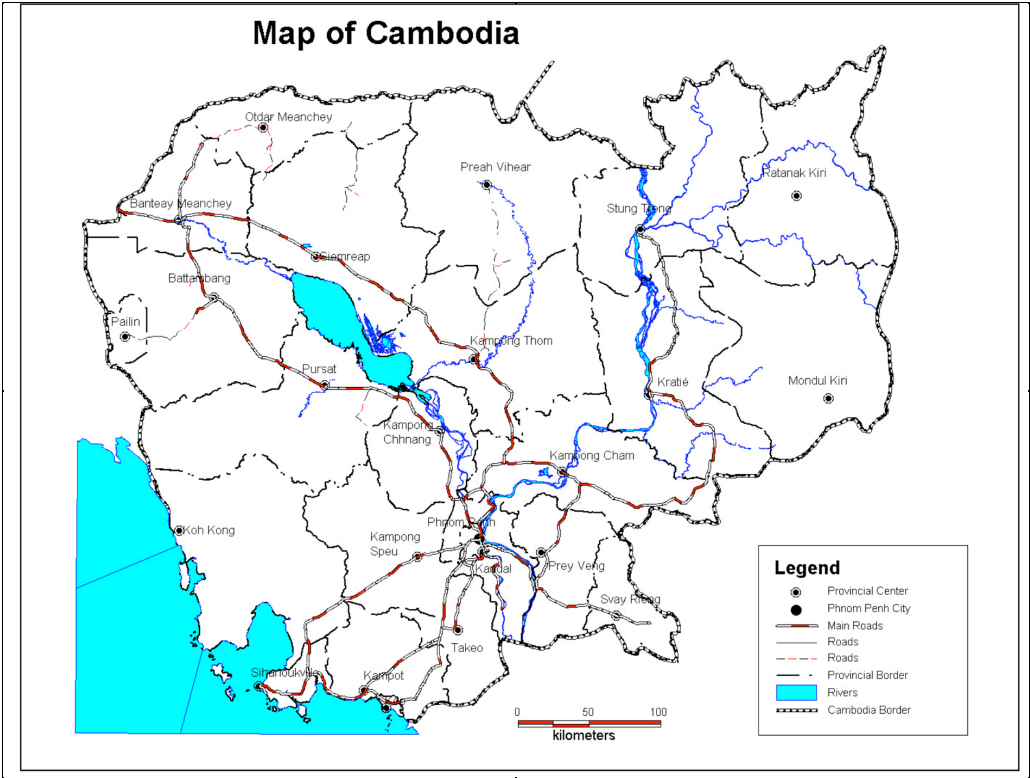
LoI	Law on Investment
LoT	Law on Taxation
LTC	Lawyers Training Centre
MAFF	Ministry of Agriculture, Forestry and Fisheries
MBPI	Merit-based pay initiative
MCRRC	Ministerial Conference on the Rehabilitation and Reconstruction of Cambodia
MDGs	Millennium Development Goals
MEF	Ministry of Economy and Finance
MFA	Multifiber Agreement
MFN	Most favored nation
MIGA	Multilateral Investment Guarantee Agreement
MoJ	Ministry of Justice
MoP	Ministry of Planning
MoU	Memorandum of Understanding
MPs	Members of parliament
MPDF	Mekong Project Development Facility
MPWT	Ministry of Public Works and Transport
MTEF	Medium-Term Expenditure Framework
NAA	National Audit Authority
NBC	National Bank of Cambodia
NIS	National Institute of Statistics
NGO	Non-Governmental Organization
NWO	New World Order
NPRD	National Programme to Rehabilitate and Develop Cambodia
NPRS	National Poverty Reduction Strategy
NSDP	National Strategic Development Program
NTR	Normal trade relations
ODA	Official Development Assistance
OHCHR	Cambodia Office of the High Commissioner for Human Rights
OPIC	Overseas Private Investment Corporation
PAR	Public Administration Reform
PFM	Public financial management
PFMRP	Public Financial Management Reform Program

PMG	Priority Mission Group
PPI	Private Participation in Infrastructure
PPIAF	Public-Private Infrastructure Advisory Facility
PRGF	Poverty Reduction and Growth Facility
PRGO	Poverty Reduction and Growth Operations
PRC	People's Revolutionary Council
PRK	People's Republic of Kampuchea
PRP	People's Revolutionary Party of Cambodia
PSD	Private Sector Development
RCAF	Royal Cambodian Armed Forces
RGC	Royal Government of Cambodia
RoL	Rule of Law
RS	Rectangular Strategy
RTAs	Regional trading agreements
SAD	Single Administrative Document
SCAC	Supreme Council Against Corruption
SCM	Supreme Council of Magistracy
SEDP	Socio-Economic Development Plan
SEZs	Special economic zones
SITF	Special Inter-Ministerial Task Force
SLC	Social Land Concessions
SLJR	Strategy for Legal and Judicial Reform
SNC	Supreme National Council
SPS	Sanitary and Phytosanitary
SPT	Special and preferential tariff
SWAp	Sector-Wide Approach
SWOT	Strength-Weakness-Opportunity-Threat
TAF	The Asia Foundation
T&C	Textile and clothing
TBT	Technical Barriers to Trade
TI	Transparency International
TIFA	Trade and Investment Framework Agreement
TRIM	Trade-Related Investment Measures
TRIPS	Trade-Related Aspects of Intellectual Property Rights

TWG	Technical Working Group
UN	United Nations
UNCAC	United Nations Convention Against Corruption
UNDP	United Nations Development Programme
UNTAC	United Nations Transitional Authority in Cambodia
UNDAF	United Nations Development Assistance Framework
UPOV	International Convention for the Protection of New Varieties of Plants
USTR	United States Trade Representative
VAT	Value-added tax
WB	World Bank
WEF	World Economic Forum
WEO	World Economic Outlook
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

**Cambodia: Selected Indicators**

<b>People</b>	<b>2006</b>
Population, total	14.2 million
Surface area (sq. km)	181.0 thousand
Population growth (annual %)	1.7
Life expectancy at birth, total (years)	58.9
Fertility rate, total (births per woman)	3.3
Adolescent fertility rate (births per 1,000 women ages 15-19)	43.5
Mortality rate, under-5 (per 1,000)	82.2
Malnutrition prevalence, weight for age (% of children under 5)	28.4
Immunization, measles (% of children ages 12-23 months)	78.0
Primary completion rate, total (% of relevant age group)	86.6
School enrollment, secondary (% gross)	38.2
<b>Economy</b>	
Nominal GDP (current US\$)	7.3 billion
GDP per capita	512
GDP growth (annual %)	10.8
Inflation, GDP deflator (annual %)	4.7
Agriculture, value added (% of GDP)	30.1
Industry, value added (% of GDP)	26.2
Services, etc., value added (% of GDP)	43.7
Exports of goods and services (% of GDP)	68.8
Imports of goods and services (% of GDP)	75.8
Gross capital formation (% of GDP)	21.5
Revenue, excluding grants (% of GDP)	9.8
Total external debt (\$ millions)	3.5 billion
Short-term debt (\$ millions)	209.1 million
Foreign direct investment, net inflows (BoP, current US\$)	483.2 million
Workers remittances and compensation of employees, received (US\$)	297.4 million
Official development assistance and official aid (current US\$)	529.0 million
Source: <i>World Development Indicators database</i> , April 2007	



# **PART I**

## **CHAPTER I:**

### **STATEMENT OF THESIS AND CONCEPTUAL FRAMEWORK**

## **Chapter I: Statement of Thesis and Conceptual framework**

### **I. STATEMENT OF THESIS**

In the context of Asian economic growth and development over the past 30 years, policy choices have been shown to be crucial for achieving high growth rates. Policy choices affect key economic growth factors, such as savings rates, the ability to engage in international trade, and the quality of institutions. Experience of the high performing economies in Asia over the past decades is the best evidence that those with relatively low income levels are, with the right policy and institutional choices, able to catch up with the richer ones.

This thesis advances the view that, in an era of regionalization and globalization, Cambodia, as a least developed country, can deliver sustained economic growth, social stability and development if it can develop a coherent set of economic policies linked to the development of a functional and credible legal system. Moreover, there is scope for Cambodia to ‘catch up’ or ‘skip the learning curve’ provided it can draw from the experiences - policies, legal system and institutions that have been discovered, tried, tested and refined - of other countries with similar background and with proven track records of rapid economic growth. The thesis will advance the question of whether Cambodia can actually skip the learning curve, and if so, how? and if not, why?

### **II. HYPOTHESES**

To address these two questions, the evolution of the economic policies and the role of law in economic development in Cambodia will be reviewed and four hypotheses (Convergence Hypothesis, Divergence Hypothesis, Differentiation Hypothesis, and Irrelevance Hypothesis) will be proposed to test whether or not Cambodia economic development, its law and legal institutions converge, substantially or partially, or show signs of convergence with the West or other advanced Asian countries. To support these hypotheses, two questions will be asked: (1) to what degree does law promote economic development? and (2) to what extent is economic development



affected if the legal system and the supporting institutions are clearly defined, established and functioning, and vice versa?

## **1. *Convergence Hypothesis***

The *Convergence Hypothesis* suggests that laws and legal institutions converge with economic development. This occurs as domestic economic development interacts with the growing internationalization of markets to produce law and legal institutions that, if not identical on paper, perform largely similar functions. Policy, legal and institutional reforms have become an important element in economic reform efforts around the world. In most cases, emerging market economies or developing economies are encouraged, at times coerced, to copy or emulate international best practices that have proven or appeared to have worked in more advanced economies. The implicit assumption behind these efforts is that legal systems converge with economic development and that law can promote this process of convergence. The validation of the Convergence Hypothesis would then suggest that the Cambodian experience - policies, legal system and institutions - converges with those of the West or other advanced Asian countries thus indicating the degree of catch-up is feasible.

## **2. *Divergence Hypothesis***

The *Divergence Hypothesis* suggests that the economy follows a distinct path of legal development. The laws and legal institutions of a country vary not only in design, but also in function. This may in turn influence economic development, because different legal arrangements may be more or less conducive to economic growth. If the Divergence Hypothesis is validated then it would suggest that catch-up may be possible though not necessarily along international best practices but through other major different factors typically identified as culture, tradition and history. Cambodia's progress could be shaped by its own unique cultural endowments and geopolitical influence, thus implying that its path of catch-up diverges from the West and other advanced Asian countries.

### 3. *Differentiation Hypothesis*

The *Differentiation Hypothesis*, a middle ground between the previous two extreme views, suggests that some areas of laws and institutions may converge with economic development, while others may develop along an idiosyncratic path and persistently diverge as the result of the country socio - and political economic environment, or cultural or other path dependent factors. If the Cambodian experience supports the Differentiation Hypothesis, then we would see a halfway-house in which some experiences might converge, while others persistently diverge. The hypothesis would point to strong signs of policy catch-up in the area of economic and trade integration, while it would simultaneously highlight the slow convergence of the country's legal and judicial institutions, i.e. the persistent lack of the notion of calculability and predictability, an element so essential to a functioning market economy. Another indicator would be the sign of convergence in the shift from discretionary to rules-based decisions versus the more path-dependent institutional framework for the granting and protection of property rights, political leadership and the bureaucracy.

### 4. *Irrelevance Hypothesis*

The *Irrelevance Hypothesis* suggests that there is no detectable link between different legal arrangements and economic growth factors and, as such, law as a formal legal system is irrelevant to economic and social development. For the question of catch-up, the Irrelevance Hypothesis can be dismissed. In light of the progress in the past half century, there is little basis for arguing that policies, legal system and institutions have not played an important part in the Cambodia's economic development.

## III. METHODOLOGY

In addressing both the effects of law on the economy and of the economy on law, the points of reference used are prevailing social and legal theories that are based primarily on the experience of the West, rather than empirically-tested propositions. The experiences of advanced Asian countries whose dynamic economies have displayed outstanding performance in the last several decades will be analysed. To complement the analysis, when relevant, the experiences of other Asian countries

with average economic growth will be reviewed. To capture the usually slow change of institutional behavior over time, the length of the period covered for Cambodia's economic and legal development will run over the course of 50 years – from 1953 after the country obtained its independence from the French – to the present days 2007. Analytical emphasis will be on the last 16 years – from 1991 after the signing of the Paris Peace Accords. On the question of development, only the quantitative dimension of the development experiences will be covered.

#### **IV. CONCEPTUAL FRAMEWORK**

The thrust of the 'skipping the learning curve' thesis leads us to the design of the following conceptual framework the basic premises of which rest upon 2 interconnected external and internal factors. External factors encompass economic and development trends since the post Cold War and the advent of the New World Order (NWO) to the Doha Development Agenda (DDA) and the Millennium Development Goals (MDGs). Legal and economic development trends encompass the earlier modernisation theories and the "Law and Development (L&D)" movement followed by the rational choice theories and the "Law and Economics or the Rule of Law (RoL) movement". Internal factors include, among others, the influence and impact of the Cambodian history on the country evolving institutions to Cambodia's economic culture, its development challenges, its legacy of legal transplant and the recent influence of the neo-liberal modernist theory and its accompanying RoL movement.

##### **A. External Factors**

###### **1. Economic and development trends**

**(a) The post-WWII era:** The overall architecture of the post-WWII era is marked by two opposing approaches, one for the developed world and the other for the developing world. In the advanced countries of Europe and the United States, this was the era of "embedded liberalism", a regime characterized by a balance between

openness, democracy, and economic fairness.<sup>1</sup> In the developing world, this was the era of state-led growth, import-substitution industrialization and relatively closed markets. In response to the pressures of nationalism and demands for decolonialization, developing countries sought to build their own industrial capacity by limiting manufactured imports from advanced economies and providing subsidies for national firms. The basic economic model was one of a regulated market economy in which the state played an active role, not just through various forms of planning and industrial policy but also through state ownership of major industries and utilities.

**(b) *The post Cold War and the advent of the New World Order “NWO”:*** The end of the Cold War and the fall of communism brought about a shift in global politics and economics which have had a significant impact on thinking about strategies for economic development. Following the disintegration of the Soviet bloc in 1989-91 and the decision by almost all of the ex-socialist countries to adopt a market oriented economic system, there has been intense debate about how best to effect a transition from socialism to capitalism.

In stark contrast to perspectives on development between the 1950s and the 1970s, the post-Cold War period is marked by two thinking: (1) an increased scepticism in regard to the role of the state to engineer both social change and economic growth, and (2) an increased belief in the supremacy of capitalism. The basic tenets of the modernization theory of the 1950s and 1960s re-emerged and legitimized the kinds of neo-liberal economic policies that gained credence in the West under the aegis of the Reagan and Thatcher administrations.<sup>2</sup>

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<sup>1</sup> Trubek describes:

‘embedded liberalism’ as an international regime that operated to facilitate domestic politics and shield domestic systems of economic regulation and social protection in advanced capitalist countries from global shocks. It allowed individual nations leeway to regulate the economy, promote employment, insure against economic risks, and redistribute income. It supported democratic politics at the national level, ensuring that when governments exercised the powers safeguarded to them by the international regime they would act in the best interests of their citizens. This system combined efficiency with legitimacy: its great virtue was that once the international machinery was set in motion, the nation states had effective authority over their economies, major political choices could be made at the national level, and national governments could be held accountable through democratic processes.

See David M. Trubek, ‘Rule of Law in Development Assistance: Past, Present, and Future’ in David M. Trubek and Alvaro Santos (eds), *The New Law and Development: A Critical Practice* (2006) 81-2.

<sup>2</sup> Ibid 83.

The vision of a world of partially closed national economies and state-controlled national markets gave way to a vision of a fully open global economy with minimal state involvement and free flows of goods and capital across national boundaries. The spread of liberal economic policies in the developed countries, the creation of more open economies in the developing countries and the integration of the ex-socialist countries into the world economy have accelerated the process of globalization. The changes in thinking about economic development and policy models can be best situated within three different periods of the World Bank's main development models.<sup>3</sup>

The *first* period going from 1980 to 1990, that of "structural adjustment", was a period of market shock and trade liberalization. The *second* period running from 1990 to 1999, which witnesses the emergence of "governance" was inaugurated by the dismemberment of the Soviet Union, the dramatic political transformation of Eastern Europe and a severe political crisis in the African continent in the late 1980s and early 1990s.

The *third* period, from 1999 onward to the present day, is one of "comprehensive development", better known within the World Bank circle as the "Comprehensive Development Framework (CDF)."<sup>4</sup> The strategy was launched as a response to the critiques of the neo-liberal economic policies and sought to turn from a focus on economic growth to one of "interdependence" of all aspects of development. CDF seeks to reconceptualize development by going beyond its macroeconomic and financial aspects to focus on structural, social, and human concerns. The quest is for a stable, equitable and sustainable development. The reduction of poverty, or rather freedom from poverty, has been introduced as a central part of the strategy.<sup>5</sup>

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<sup>3</sup> See Alvaro Santos, 'The World Bank's Uses of the "Rule of Law" Promise in Economic Development' in David M. Trubek and Alvaro Santos (eds), *The New Law and Development: A Critical Practice* (2006) 267.

<sup>4</sup> The CDF was initiated by President James D. Wolfensohn in his paper, *A Proposal for a Comprehensive Development Framework* (January 1999) addressed to the the Board, Management, and Staff of the World Bank Group. The paper is also available at <<http://siteresources.worldbank.org/CDF/Resources/cdf.pdf>> at 30 June 2008.

<sup>5</sup> The concept of "freedom from poverty" has been made famous by the pathbreaking works of Amartya Sen, *Development as Freedom* (2000). See also Arthur MacEwan, *Neo-Liberalism or Democracy: Economic Strategy, Markets, and Alternatives for the 21<sup>st</sup> Century* (1999). MacEwan argues convincingly that it is possible to construct a democratic economic strategy that produces growth and equity, while protecting the environment and securing local communities.

Broadly speaking, the three periods encompass the rise and fall of neo-liberal thinking, or the so-called Washington Consensus, and the subsequent move to an “enlightened” Washington Consensus, mediated by a decade of profound reforms and severe crisis.

**(c) *The Millennium Development Goals (MDGs) and the Doha Development Agenda (DDA): an agenda for development partnership:*** The reaction to the disappointing developmental results led to a number of important initiatives. More than at any point in the recent history of development cooperation, efforts are now being made to devise collective international approaches to development cooperation either in the form of objectives such as the Millennium Development Goals (MDGs),<sup>6</sup> to be achieved by 2015, or through the provisions and principles of good practices such as the Paris Declaration on Aid Effectiveness.<sup>7</sup> Disenchantment with the development record of trade liberalization was also reflected in the multilateral trading system, when WTO members agreed on another round of trade negotiations in 2001 that included an explicit development agenda, the so-called Doha Development Agenda (DDA).

At the Millennium Summit in 2000, the world leaders aspired to the goal of developing a true Global Partnership for Development which pointed to the establishment of an inclusive and equitable globalization, and which can be best achieved through a “human development paradigm.”<sup>8</sup> The Millennium Declaration further resounds the need to develop an open, rule-based, predictable, non-discriminatory trading system, and a commitment to good governance, development, and poverty reduction — both nationally and internationally.

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<sup>6</sup> The eight Millennium Development Goals (MDGs) – which range from halving extreme poverty to halting the spread of HIV/AIDS and providing universal primary education, all by the target date of 2015 – form a blueprint agreed to by all the world’s countries and all the world’s leading development institutions. They have galvanized unprecedented efforts to meet the needs of the world’s poorest. See texts at <http://www.un.org/millenniumgoals> at 30 June 2008.

<sup>7</sup> The Paris Declaration, endorsed on 2 March 2005, is an international agreement to which over one hundred Ministers, Heads of Agencies and other Senior Officials adhered and committed their countries and organisations to continue to increase efforts in harmonisation, alignment and managing aid for results with a set of monitorable actions and indicators. See texts at <[http://www.oecd.org/document/18/0,2340,en\\_2649\\_3236398\\_35401554\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/18/0,2340,en_2649_3236398_35401554_1_1_1_1,00.html)> at 30 June 2008.

<sup>8</sup> The human development paradigm has benefited and gained legitimacy with the pathbreaking works of Amartya Sen. See, eg, Amartya Sen, *Resources, Values and Development* (1984); *Development as Freedom* (2000).

The commitment of world leaders on this new development platform has gradually taken root around the world and within a short period of time, the MDGs have gained tremendous currency, primarily in development circles but increasingly in related trade and finance circles. The MDGs have now come to occupy a pivotal position on the global development agenda – which began at the 2002 United Nations International Conference on Financing for Development held in Monterrey, Mexico, at the 2002 World Summit on Social Development held in Johannesburg, South Africa, and continued up to the 2005 Group of Eight (G8) Summit held at Gleneagles, Scotland.

For developed countries, the MDGs platform represents indeed a commitment to boost development assistance, trade opportunities, debt relief, technology transfer, reduce agriculture subsidies and provide other support needed to achieve the goals. But the post- September 11 era has added a new dimension to the importance and timeliness of a global compact for development and commensurate financing. Financing of development in the 21<sup>st</sup> century is most likely going to be subject to new forms of modalities engineered according to market mechanisms. Developing countries performances will be increasingly assessed against economic, financial, anti-poverty as well as governance performances. Complementary ODA, other forms of development financing and possibly new ones will increasingly flow in/to developing countries, or otherwise, on the basis of concrete progress towards set benchmarks.

***(d) Rapid evolution of development factors***

*(i) Capital Movements and FDI (Foreign Direct Investment) as instruments to leap frog:* The last decade of the 20th century has seen major shifts in the size and composition of cross-border capital flows into developing countries. Net debt flows have become less and less important. Portfolio flows have become firmly established. FDI has come to swamp all other financial flows. At the same time, following the collapse of communism in Eastern Europe and the former Soviet Union, official aid flows to developing countries have declined somewhat in absolute terms.

Maddison asserts that the key to economic development is the transfer and adoption of best practice across borders. Before the industrial revolution it took some 350 years for income per capita to double in Europe. As the industrial revolution accelerated in the 19th century it took the lead country, Britain, over 60 years to double per capita income. Towards the end of the 20th century several rather diverse countries managed to double per capita income in just about 10 years - including, for example, Botswana, Chile, China, Ireland, Japan and Thailand. Such rapid growth is now possible for those developing economies that are able to import and imitate technical and organizational innovations from the world's leading countries. Growth of this rapid type makes it possible for the first time in history to propel people from poverty to a reasonably comfortable life within a single life span.<sup>9</sup>

FDI is a key ingredient for successful economic growth in developing countries. This is because the very essence of economic development is the rapid and efficient transfer and adoption of "best practice" across borders. FDI also helps reduce adverse shocks to the economy resulting from financial instability as during the 1997 Asian crisis. With the prevailing economic conditions in 2008 and a tightening grip on credit as a result of the sub-prime meltdown, it is likely that FDI may well emerge as the driving force of globalisation.<sup>10</sup>

(ii) *Technological and Institutional Innovation:* Maddison asserts that from the year 1000 to 1820, advances in technology were much slower than they have been since, but they were nevertheless a significant component of the growth process. Without improvements in agriculture, the increase in world population could not have been sustained. Without improvements in maritime technology and commercial institutions the opening up of the world economy could not have been achieved. Technical advance in important areas was dependent on fundamental improvements in

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<sup>9</sup> Maddison argues that:

These changes, and the ensuing improvements in living standards, were always the result of productivity gains that took a long time, even decades, to spread from the sectors first affected by technological change to the rest of the economy, first in those countries where the inventions were first applied and then gradually to the rest of the world.

Angus Maddison, *The World Economy: A Millennial Perspective* (2001) 23.

<sup>10</sup> The volume of international cross-border FDI grew by 5.5% in 2007 reaching \$950.8 billion outlining the increased importance of FDI to the global economy. See OCO Global and World Association of Investment Promotion Agencies (WAIPA), *2007/2008 Review of Foreign Direct Investment* (2008) 8.



scientific method, experimental testing, systematic accumulation and publication of new knowledge. The long centuries of effort provided intellectual and institutional foundations for the much more rapid advances achieved in the nineteenth and twentieth centuries.<sup>11</sup>

The world economy is increasingly driven by technological innovations. Technology networks are transforming the traditional map of development, expanding people's horizons and creating the potential to realize in a decade progress that required generations in the past. Telecommunications and associated information and communication technologies (ICTs) can also play a very critical role in catapulting a country out of the least developed country status. Like previous technological upheavals that have had profound consequences for the economy, the ICT revolution has made, and will continue to make great and lasting impact on the ability of enterprises to create value and to compete in increasingly globalized markets, on the use of technology to generate innovations that improve the livelihoods of the poor, and on the overall productivity and growth of national economies.<sup>12</sup>

Although the LDCs as a group still have a long way to go before they can graduate from their current status, there have indeed been visible positive developments over the last decade. Back then, the International Telecommunication Union (ITU) 2000 report concludes that:

".....If these opportunities are properly utilized and, by learning from the experiences of the developed and other low-income countries in their telecom and ICTs development, the LDCs have a chance to "*leap-frog*" the various stages of development to join and live in the global knowledge economy and society."<sup>13</sup>

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<sup>11</sup> Madisson, above n 9, 3.

<sup>12</sup> For a thorough analysis of the current - and potential - contribution of ICT to knowledge creation and diffusion, see UNCTAD, *Information Economy Report 2007-2008: science and technology for development, the new paradigm of ICT* (2008).

<sup>13</sup> International Telecommunication Union (ITU), *Telecommunications and Information and Communication Technologies in the LDCs* (2000).

***(e) Regional dynamics or the emergence of a “second generation” of globalization:***

China’s accession to the WTO, in itself an economic event of historic proportions, and a growing trend of South-South regionalization provide the context for East Asian development today.

*(i) China's accession to the WTO:* China's accession to the WTO in November 2001 — the culmination of a 15-year-long bid for membership, already had and will have profound implications on the dynamism of the world markets as well as regional markets. China's economy is already one of the largest in the world, and its prominence as an economic force in the region has clearly risen since the crisis. China remains the top 3 destination countries for FDI in 2007 globally capturing around 10% of all FDI worldwide.<sup>14</sup> China's strong currency and strong growth, set against the weakening currencies and weak growth of other developing countries in the region, have meant that China's gross domestic product (GDP) now surpasses that of the rest of emerging East Asia combined. With its trade growing rapidly, China has become an important destination for exports from the rest of the region, as well as being a fierce competitor in third-country markets. Thus it is no surprise that many policymakers in the region feel the need to understand the trends at work in China before they can formulate their own development strategies.

*(ii) The growing trend of regionalization:* Another fundamental change in the pattern of the world economy has been associated with the role of the South. A number of large developing countries such as China, India, Brazil and South Africa have experienced spectacular growth over the past decade, making them engines of growth for the world economy. As a result, the share of South-South trade is increasing in the world economy, making inter-South trade a veritable locomotive of growth. A “second generation” of globalization is thus emerging. A distinctive characteristic of this phase of globalization is economic multi polarity, in which the South plays a significant role.<sup>15</sup>

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<sup>14</sup> OCO, above n 10, 10.

<sup>15</sup> United Nations Conference on Trade and Development (UNCTAD), *Report of the Secretary-General of UNCTAD to UNCTAD XII: Globalization for development, Opportunities and challenges* (2008) vii.

Another notable feature of the international trading system is the worldwide proliferation of regional integration initiatives, in particular regional trading agreements (RTAs). The number of operational RTAs, whether South-South, North-North or North-South, is expected to grow to 400 by 2010. Currently, trade between RTA partners accounts for nearly 45 per cent of global merchandise trade. Given the growing number, membership and trade coverage of RTAs, their impact on the international trading system will be significant.<sup>16</sup>

In the Asia-Pacific region, traditionally more formal economic cooperation and economic integration arrangements and agreements between countries in East Asia have been quite limited with the major exceptions of the ASEAN Free Trade Area (AFTA) and the dialogue under the Asia-Pacific Economic Cooperation (APEC). However, the past several years have seen a proliferation of regional and bilateral agreements which has provided a needed momentum – or pressure - to the slow moving global trade round.

Internally, ASEAN, for example, has moved to a two-tier system to permit its more advanced members to accelerate trade reform, while launching new initiatives to integrate its less developed members, Cambodia, Lao PDR, Myanmar, and Vietnam. Externally, other framework agreements have been launched at a very rapid pace.<sup>17</sup> The stated motivation of these initiatives is to take advantage of complementarities and build on existing strengths in order to make the region collectively more efficient and competitive, and thereby also attract investment.<sup>18</sup> ASEAN ministers hoped to fast-track plans to create a European-style single market by 2015 as the region struggles to strengthen its economic muscle to counter competition from rising giants China and India.

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<sup>16</sup> Ibid 30.

<sup>17</sup> A few most prominent of such initiatives are the Framework Agreement for ASEAN–China Economic Cooperation; an East Asia–wide Free Trade Agreement; an ASEAN–plus–Japan Free Trade Agreement. These regional initiatives are increasingly comprehensive in scope, going beyond the removal of tariffs and non-tariff barriers on trade in goods to include trade facilitation measures such as conformity of standards and procedures across national boundaries, and trade in services. See, generally, Katie Krumm and Homi Kharas (eds), *East Asia Integrates: A Trade Policy Agenda for Shared Growth* (2003).

<sup>18</sup> Asia Pacific remained the number one region for FDI globally in 2007 — the volume of FDI in Asia-Pacific grew by 21 % and capturing 31 % of all investment worldwide in 2007— demonstrating the continued attractiveness of Asia-Pacific to investors. See OCO, above n 10, 8.

## 2. *Legal and economic development trends*

**(a) *Earlier modernisation theories and the ‘Law and Development (L&D)’ movement:*** The emergence of legal institutions and the rule of law has been the subject of much debate, most of which has centered on the argument that there is a nexus between the growth of a market economy and the development of the rule of law.<sup>19</sup>

The earlier modernization theories, which took in the form of the ‘Law and Development (L&D)’ movement, was conceived and launched in the early days of the 1960s when liberal internationalism flourished and liberal legalism was a confident creed. Relying on Max Weber's emphasis upon the contribution of predictable positive law to economic development, early L&D theorists favoured rules that were general and autonomous, with clear boundaries between the public and private spheres. The underlying assumption of this school of thought was, of course, that the inexorable logic of economic modernization will bring in its wake a modern and rational legal system; in other words, that economic modernization enables the rationalization of the legal system.

Starting in the 1950s and reaching a zenith during the United Nations development decade (1960s), Western – mostly American – scholars urged developing countries to copy modern features of developed countries, including their legal systems. The L&D movement, built around the dominant Western development paradigm of the time, gave priority to state-led initiatives and the development of internal markets.<sup>20</sup>

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<sup>19</sup> For a collection of essays that identify and analyze a new phase in thinking about the role of law in economic development and in the practices of development agencies that support law reform see, eg, David M. Trubek and Alvaro Santos (eds), *The New Law and Development: A Critical Practice* (2006); Kenneth W. Dam, *The Law-Growth Nexus: The Rule of Law and Economic Development*, (2006); Edgardo Buscaglia and William Ratliff, *Law and Economics in Developing Countries* (2000); Kanishka Jayasurya (ed), *Law, Capitalism and Power in Asia: The rule of law and legal institutions* (1999).

<sup>20</sup> Trubek has structured the Western development paradigm as resting upon four main pillars, namely: (1) a cultural reform and transplantation strategy; (2) an ad hoc approach to reform based on simplistic theoretical assumptions; (3) faith in spillovers from the economy to democracy and human rights; and (4) a development strategy that stressed state-led import substitution. For a detailed analysis of the L&D movement, see David M. Trubek, ‘Rule of Law in Development Assistance: Past, Present, and Future’, above n 1, 74-81.

By the end of the decade, the political context had changed dramatically and the failures of the L&D movement became apparent. In the course of the 1970s all the pillars upon which the movement rested crumbled. The swift decline of the law and development movement led to the emergence of a whole series of analyses of institutional change, largely influenced by the methodology of classical economics.<sup>21</sup>

**(b) *Rational choice theories and the “Law and Economics or the Rule of Law movement”:***

(i) *The Rational Choice Theory:* The “rational choice theorists or institutionalists” who succeeded the earlier modernisation theorists sought to place emphasis on the importance of legal institutions, and institutions in general, by allowing governments to credibly commit to upholding property rights. Thus, rational choice institutionalists claim that successful long-term economic growth requires incentives for political as well as economic actors to desist from rent seeking. From this perspective, institutions reflect the rise and success of commercial minded interests whose primary aim lies in the establishment of a set of institutions that restrict the ability of rulers to engage in predatory and rent seeking behaviour.<sup>22</sup> Consequently, a credible legal framework that guarantees property rights becomes a central element of this institutional ensemble, which provides a kind of backing for the market participants on centre stage.

Unlike their predecessors, the theories of rational choice institutionalism as embodied in the form of the contemporary “Law and Economics movement” or the “Rule of Law movement (RoL)” took shape in a very different conjuncture. When RoL really became big business in the 1990s, major changes had occurred in the world economy and world politics marked by a significant increase in the degree of world economic

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<sup>21</sup> Neo-institutional economics is associated with the names of two Nobel Prize winners of the 1990s, Ronald Coase and Douglass North. Ronald Coase's Nobel citation states that he won the prize "for his discovery and clarification of the significance of transaction costs and property rights for the institutional structure and functioning of the economy." North's contribution, according to his Nobel citation, was to renew "research in economic history by applying economic theory and quantitative methods in order to explain economic and institutional change. The texts are available at <[http://nobelprize.org/nobel\\_prizes/economics/laureates](http://nobelprize.org/nobel_prizes/economics/laureates)> at 30 June 2008.

<sup>22</sup> Mancur identifies the conditions necessary for economic success: on the one hand, secure and well-defined rights for all to private property and impartial enforcement of contracts and, on the other hand, the absence of predation. See Olson Mancur, *Power and Prosperity: Outgrowing Communist and Capitalist Dictatorships* (2000).

integration: phenomenal growth in international trade driven by the success of export-led growth in Asia; the spread of industry into the “third world”, the globalization strategies of major transnational corporations and rapid deregulation of capital markets.

By the end of the 1990s, the theory that institutions were the most important determinant of the pace of economic development in any given country became well established and exerted a strong influence in much of academia and in the research departments of various international financial institutions like the World Bank and the Asian Development Bank.<sup>23</sup>

In retrospect, the rule of law is scarcely a new idea.<sup>24</sup> It is receiving so much attention now because of its centrality to both democracy and the market economy in an era marked by a wave of transitions. In framing the revival of the rule of law, Carothers states:

Since the early 1980s many countries in different regions have experienced political openings, held reasonably free and fair elections, and established the basic institutions of democracy. Many have rewritten their constitutions and laws and initiated key changes in their legal institutions. Many government officials have begun accepting the law's authority and respecting judicial independence....Others, however, are still struggling with poorly performing institutions, citizens' low regard for governments, and the challenge of going beyond mere democratic processes to genuinely democratic values and practices....For states grappling with democratic consolidation, fortifying usually weak rule of law appears to be a way of pushing patronage-ridden government institutions to better performance, reining in elected but still only haphazardly law abiding politicians in new democracies. For backsliding systems, strengthening the rule of law seems an appealing bulwark against creeping authoritarianism and the ever-present threat of a sabotage of constitutional order.<sup>25</sup>

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<sup>23</sup> Other views remain important, in particular, one competing view which emphasizes the role of geographical factors in explaining differing rates of economic growth and the other school of thought which emphasizes social factors (social norms, culture, religion) in a country's population.

<sup>24</sup> For a history, politics, and theory surrounding the rule of law ideal, beginning with classical Greek and Roman ideas, elaborating on medieval contributions to the rule of law, and articulating the role played by the rule of law in liberal theory and liberal political systems, see Brian Z. Tamanaha, *On the Rule of Law: History, Politics, and Theory* (2004). For the latest thinking, see the Hague Institute on the Internationalization of Law (HiIL), *Rule of Law Inventory Report: Discussion for the High Level Expert Meeting on the Rule of Law* (2007).

<sup>25</sup> Thomas Carothers, 'The Rule of Law Revival' in Thomas Carothers (ed), *Promoting the Rule of Law Abroad: In Search of Knowledge* (2006) 5-6.

(ii) *The 'Rule of Law (RoL) movement'*: Just as the earlier modernization theories had a marked influence on the development of legal reform programs two decades ago, so the growing influence of theories of rational choice institutionalism is readily evident in a range of international financial institutions (IFIs) programs on legal reform. The result has been a proliferation of law reform projects and programs supported by development assistance institutions. Enthusiasm for law reform as a development strategy boomed during the 1990s and resources for reforming legal systems soared everywhere. Developed countries and international organizations, which once focused primarily on building roads and dams and getting macroeconomic variables right, now proclaim the importance of the "rule of law" and spend billions over the last twenty years trying to build the rule of law in countries transitioning to democracy or attempting to escape underdevelopment.<sup>26</sup>

It is apparent that a key objective of these programs is to develop a legal environment characterized by respect for property rights, by a law-making process capable of integrating business oriented laws within the prevailing legal system and minimizing regulatory intervention, and by legal institutions capable of implementing those laws in an efficient and transparent manner. Like telecommunications and roads, multilateral and most Western bilateral aid providers assume that rights-based, normative legal systems are a prerequisite of efficient industrial economics.

Notwithstanding this enthusiasm, there are emerging signs in recent years that development institutions have raised doubts about some aspects of the program of law reform initially associated with the neo-liberal Washington Consensus.<sup>27</sup> Among the key concerns are the recognition of the failures of transplants and top-down reforms; the need to stress for context-specific project development and long term horizons; the need to add labor rights, women's rights, and environmental protection to business and economic regulation; and the need to acknowledge for special efforts to ensure access to justice.

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<sup>26</sup> The World Bank alone estimates to have spent about \$4.24 billion in 2007 in RoL projects and programs (World Bank Annual Report 2007).

<sup>27</sup> Thomas Carothers is probably the most vocal of all critics. He challenges official thinking on a range of issues and questions the validity of key aspects of conventional RoL wisdom such as whether: (1) the rule of law is necessary to attract foreign investment; (2) technical improvements in the administration of justice are necessary for democracy; and (3) the court system is the core of "the rule of law." See, generally, Thomas Carothers (ed), *Promoting the Rule of Law Abroad: In Search of Knowledge* (2006).

(iii) *Similarities between the earlier modernisation theories and the rational choice theories*: Despite some differences in the theoretical armoury of modernization and rational choice institutionalist perspectives — perhaps best illustrated in the shift from sociology to neoclassical economics — both theories share a number of elements.<sup>28</sup>

First, they assume a nexus between the development of market forms of economic life and the emergence of stable effective legal regimes. Indeed, there is a striking similarity in the Weberian idea of the legal system providing a calculability and predictability of actors in the market and North's thesis that legal institutions provide a framework for states to provide credible commitments to market-enhancing property rights. In both instances, the legal system is seen as the handmaiden of the market.<sup>29</sup> A subsidiary assumption in this respect is that law is about creating a set of bargaining chips or a set of entitlements and rights that enable transactions to be carried out between various market participants, all of which are predicated upon the existence of an independent and autonomous civil society.

*Second*, both theories share, to an extent, the assumption that the development of the market leads to the emergence of a strong middle class or the presence of commercial interests which in turn hastens the development of representative institutions and the rule of law. Implicit in this argument is that institutional change arises from pressures on the state generated by social and economic forces unleashed by the development of a market economy. In this context, institutional change is seen as a product of revolution from '*below*' rather than from '*above*'.

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<sup>28</sup> Kanishka Jayasurya, 'Introduction: A framework for the analysis of legal institutions in East Asia' in Kanishka Jayasurya (ed), *Law, Capitalism and Power in Asia: The rule of law and legal institutions* (1999) 5-6.

<sup>29</sup> The work of Douglass North, in particular, had a strong impact on the way development policymakers began to think about law and legal rules as institutional foundations for a market economy. North's historical work advanced the argument that legal institutions that securely enforced property rights were favorable for economic efficiency and growth. Divergence from this pattern could be attributed to special interest groups and transaction costs that explained the prevalence of inefficient property rights and lack of economic growth. Changing developing countries' institutions, and primarily legal systems, could break the institutional path dependence responsible for countries' economic stagnation and pave the way to more efficient markets. See especially Douglass C. North, *Institutions, Institutional Change, and Economic Performance* (1990).



*Third*, both modernisation and rational choice theories assume that the major dynamics driving institutional change are *internal* to the nation-state. This can be clearly seen, for instance, in the overriding focus in both approaches on the link between the rise of a domestic middle class on the one hand, and the emergence of liberal legal systems on the other. Yet, dynamics, which are *external* to the nation-state, may also play a central role in shaping institutional change.

*Finally*, a feature common to both modernisation and rational choice theories is the assumption that the development of the rule of law is associated with the following institutional characteristics: the rise of a liberal, political and social outlook alongside the rise of parliamentary and representative democracy; the growth of an independent associational life; the emergence of an independent and neutral bureaucracy; and, the growing influence of a civil language in fashioning relations between the state and its citizens. In other words, the emergence of legal institutions is associated with a package of liberal institutions that transform state-society relationships.

**(c) *Internationalization of legal harmonization and the establishment of the World Trade Organization (WTO)*:** The movement towards international legal harmonization precedes economic globalization. Following World War II, international conventions on matters ranging from human rights to intellectual property rights (IPRs) have proliferated and countries around the world have made efforts to ratify and implement them. The worldwide trend in the 1990s - marked by a triple shift from state to market, from internal to export-led growth, and from official capital flows to private foreign investment - had a profound impact on the thinking about development and created a new development paradigm with important implications for the law reform agenda. The idea that the legal system is crucial for economic growth has since formed part of the conventional wisdom in development theory.

These shifts create multiple pressures for the internationalization of legal fields, affected legal procedures and promoted the development of standardized rules for international transactions. Governments felt the need to strengthen the legal foundations of market institutions and to make legal changes calculated to attract foreign investors and to secure long term market access.

Worldwide economic globalization, influenced by economic policies in countries that relied heavily on export-led growth, supports the international harmonization of laws and legal standards. Pressure from bilateral trading partners, multilateral institutions and the subsequent establishment the World Trade Organization (WTO) reinforces this trend.

**(d) *Legal evolution and legal transplants:*** The history of legal transplants is as old as law itself. Globalisation or internationalisation of law in developing countries means, predominantly, the transplanting of Western laws. For these countries, law is to be used as an instrument for social engineering, and, by transplanting Western laws, to radically alter their economies. There is nothing wrong with global borrowing in developing a legal system. Indeed, as Watson has concluded in his seminal work, *Legal Transplants*, major legal developments in the modern world are the results of borrowing. Obviously, such a reception of foreign legal institutions depends on the 'usefulness [in] and need' of the recipient country. In other words, law as an instrument for social engineering may be transplanted from one system to another.<sup>30</sup>

The reasons for the introduction of these legal transplants differ from country to country and for different areas of the law. In some cases, legal transfers are imported as part of technical assistance programs. In others, law reforms are initiated after crisis situations.<sup>31</sup> While the reasons for the legal transplants are more evident, their effects and impacts seem more illusory as demonstrated by the various problems of transplantation belatedly recognized decades ago.

Transplanted laws often do not operate in the host country the way they do in the home country. A striking feature of the history of these legal transplants is that most of them were left unenforced and without influence for years in the face of rapid economic change. A turning point in the enforcement of legal transplants in most

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<sup>30</sup> Alan Watson, *Legal Transplants: An Approach to Comparative Law* (revised ed, 1993). For a comprehensive bibliography on legal transplants and the diffusion of law, see <<http://www.alanwatson.org/readings.htm>> at 30 June 2008.

<sup>31</sup> A good example is the 1997-98 currency and financial crisis. The crisis had deep effects not only on every aspect of economic policymaking but it highlighted the failure of the region's various rule-of-law reforms to bring transparency and accountability to the dealings of the ingrown circles of privileged bankers, businessmen, and politicians. Pressure for more reform, both from within Asia and from the international financial community, is growing though.

countries is when domestic interests called for the enforcement, and often for extensive revisions, of these laws. Even then, the effectiveness of law enforcement often depends on political support. In some countries, the institutional base for adapting the law to changing realities is not present. Transplanted laws are changed erratically, sometimes in a retrogressive fashion, because the legal profession and lawmakers have so little knowledge of or experience with the legal field involved. In other countries, the mere enactment of laws accomplishes little without considerable investment in changing the conditions for implementation and enforcement.

Even though globalisation of law seems to be an unstoppable process, the long standing questions as to whether law is readily transferable, whether the transplanted law works in the same way as it does in its places of origin, and if so, under what circumstances, remain unresolved.

**(e) *Legal transplant and legal change in Asia:*** The path-dependent effects of history are central to an understanding of Asian economic development. Its evolutionary process of legal and socioeconomic development was disrupted in the last century as the result of imperialism. Political factors, which included the military and economic conquest by Western powers, greatly influenced not only the source of law but the scope of legal change. The creation of colonial empires led to a proliferation of Western legal systems in Asian countries during the second half of the nineteenth and the first half of the twentieth centuries. After World War II the process of legal borrowing from foreign sources continued after the earlier wholesale transplant of legal systems. They occurred mostly in new areas of the law for which a legal framework had not yet been established, or areas where earlier laws proved ineffective.

Many Asian governments seeking to consolidate and advance economic progress begun to modify laws and legal institutions, primarily related to commercial affairs. Other Asian countries, which had not been colonized, responded to the threat posed by the Western powers by modernizing their legal systems. In this process they borrowed heavily from the West, in particular in the first phase of market reform which focuses on major policy decisions by a small group of policy makers. The second phase which involves building institutions and the general improvement of governance where strengthening the rule of law

is integral remains more challenging. As Asia's financial crisis in the mid 1990s highlight, economic globalization is feeding the rule-of-law imperative by putting pressure on governments to offer the stability, transparency, and accountability that international investors demand. Countries such as Indonesia, Thailand, and Malaysia have realized that their impressive first generation of economic progress can be sustained only if they are backed by better bank regulation and greater government accountability.

Nonetheless the experience of Asian legal reform stands in stark contrast to this postulated link between economic modernization and the emergence of legal structures.<sup>32</sup> It has been argued that considerable economic progress in several East Asian states was made without the benefit of a strong rule of law and was not accompanied by the institutionalisation of rule of law norms in their commercial legal regimes.<sup>33</sup> In fact, the East Asian example would seem to suggest that high levels of economic performance bear little or no relation to the development of a credible legal system. It would also suggest that the dynamics of institutional change must be located in terms of the actions of state elites rather than in terms of pressures from below.

*First*, East Asian cultures have mediated the reception of these norms and the supposed relationship between the growth of capitalism and formal rational law. The spectacular economic success of Hong Kong, Singapore, Taiwan, South Korea and China, has instead been based on a cultural emphasis on family relationships and business networks, as opposed to legal institutions. There is an emphasis upon collectivist values that puts business and social interests before those of the individual, and a reliance on informal networks of relationships to protect and promote business interests. *Second*, there is the influence of a positive ideology of law, in which law is seen as a 'powerful and indispensable directive instrument of government policy, actively used on an extensive scale to reshape social and economic conditions and even popular attitudes'.<sup>34</sup>

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<sup>32</sup> See, eg, Kanishka Jayasurya, above n 19. See also Roger Cotterell, *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory* (2006).

<sup>33</sup> Carol Jones, 'Politics postponed: law as a substitute for politics in Hong Kong and China' in Kanishka Jayasurya (ed), *Law, Capitalism And Power In Asia: The rule of law and legal institutions* (1999) 43-68.

<sup>34</sup> Roger Cotterell, 'The Dominant Ideology of Law's Functions' (1988) 15 *Journal of Law and Society* (1): 5-24.

## **B.     *Internal Factors***

### **1.     *The influence of Cambodian history and its effects on institutions***

Douglass North said:

‘History matters. It matters not just because we can learn from the past, but because the present and the future are connected to the past by the continuity of a society's institutions. Today's and tomorrow's choices are shaped by the past. And the past can only be made intelligible as a story of institutional evolution. Integrating institutions into economic theory and economic history is an essential step in improving that theory and history.’<sup>35</sup>

A good deal of the development issues in Cambodia are similar to those to be found in other low-income countries. But it is also true that Cambodia as a country has a unique set of contextual historical factors that has shaped its development process. It is clear that the scale of the transition that Cambodia has navigated through in recent decades is more dramatic in many ways than those in other countries. Like other societies which also may change their culture in response to major trauma, Cambodia was making progress toward economic reform, economic stability, and political democracy in the 1990s in part as a result of its disastrous experiences with Pol Pot's brutal genocidal regime.<sup>36</sup>

One of the unique contextual factor which defines the economic landscape is the effect of history on the Cambodian institutions. A variety of ‘formal’ institutions — related to the operation of markets, administrations, legislatures, political parties, nongovernmental organizations, the judiciary, the media and the community in general — contribute to the process of development. With almost an entire intellectual society and social infrastructure destroyed by three decades long of war and instability, the ‘formal’ Cambodian world of the modern public institutions barely exists after the aftermath of the genocide regime. Much of the government efforts in the 1980s and the early part of the 1990s were dedicated to rebuilding state

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<sup>35</sup> North, above n 29, Preface.

<sup>36</sup> The two extreme cases are Germany and Japan which have changed from the two most militaristic countries in the world to two of the most pacifist following their disastrous experiences in World War II.

institutions and organizations as well as achieving some sort of political stability and legitimacy. The institutional set up during the socialist days was a positive step forward though it hardly reflected the needs of the market oriented economy.

Moreover, there is also the ‘informal’ neo-patrimonial Cambodian world which includes informal networks and influential patron-client relationships.<sup>37</sup> It is, of course, true that all countries have such informal worlds but the one in Cambodia seems more powerful and intrusive than most. These two Cambodian worlds – the formal and the informal - interact and intertwine in much of Cambodia daily economic and political lives.

One of the obvious perverse effects of Cambodia’s institutional legacy, which is profoundly altered by successive political, economic and social upheavals, is the pervasive nature of corruption in the country. The factors highlighted above, combined with widespread poverty and a dearth of institutions, have given rise to an all-encompassing corruption environment. Corruption is a key symptom of weak governance and studies show that it is widespread in Cambodian society with the judiciary, customs and tax authorities, trade, health, education, road services being the worst affected areas. "Survival" corruption is a way of life for the poor, and a succession of medium and large-scale corrupt acts are the ticket to wealth for the politically powerful. How Cambodia chooses to effect its institutional changes will almost invariably result in the acceleration or deceleration of its economic growth.

## **2. *Cambodia’s economic culture***

While culture in itself may not be adequate in explaining the economic development of Cambodia, it is without a doubt enormously important in influencing and contributing to its economic performance. Much Cambodian behaviour, including that on display in politics and public management, draws upon the rules of social and cultural institutions that have been in place in some form since pre-colonial times.

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<sup>37</sup> For a recent analysis of some of this informal world, see Cambodia Development Research Institute (CDRI), ‘Accountability and Neo-patrimonialism in Cambodia: A Critical Literature Review’ (Working Paper No 34, March 2007).

Many of these rules shape the informal systems that are so influential in Cambodian national life.

For several centuries well into the beginning of the millennia, Cambodia was the seat and centre of both political and cultural influence for all its surrounding areas. Famous monuments like the Angkor Wat bear testimony to Cambodia's past glory. Even during the colonial period till the middle of the last century, Cambodia was a prized jewel with its beauty and natural resources, minerals and abundant fertile land, not to mention its friendly people and their enduring traditions and culture. Clearly, the last decade of democratization, free market oriented policies and sufficient political stability have witnessed the gradual revival of values like emphasis on the future, work, achievement, education, merit, and frugality.

The work, motivation and creativity of Cambodian individuals have re-emerged and signs of their early successful contributions to the economic development are visible. For example, these productive aspects of culture have become critical sources of competitive advantage, resulting in new patterns of international specialization in Cambodia's tourism industry. The phenomenal annual growth of the Cambodian tourism industry of more than 30 percent for the last several years, from a mere 250,000 tourist arrivals in 1999 to nearly two million in 2007 is a case at point. In the export garment industry, one often hears praises about the 300,000 Cambodian garment workers, ninety percent of them women, as having a very good work ethic. In Phnom Penh and other urban centers the entrepreneurial spirit is evident in the many sectors of the economy.

### **3. *Cambodia's development challenges***

Cambodia's official commitment to development did not emerge in isolation. Its first steps marking the break away from the socialist regime toward modernization, and therefore reintegration into the global capitalist economy, were taken in June 1992, when Japan hosted the Ministerial Conference on the Rehabilitation and

Reconstruction of Cambodia (MCRRC).<sup>38</sup> In parallel with its role in promoting the emergence of a modern state in Cambodia, the international community played a substantial role in imposing on Cambodia's government an ideology in harmony with the imperatives of the NWO that emerged in the aftermath of the end of the Cold War. Since Cambodia has received on an annual average of about \$500 million in aid.

The last decade witnesses a shifting out of the post-conflict mode oriented first towards short-term efforts at stabilization and recovery and recently towards entering into a more conventional stage of growth and development. The shift is marked by a clear decision to move from a state-controlled model to a more market-based approach and a conscious effort to integrate more into regional and global economies. In the political sphere, Cambodia has experimented in its own way a more democratic political system including elections, political, administrative and fiscal decentralization and an increased participation of civil society.<sup>39</sup> Developmentalism in Cambodia, which embodies the aim of the modernization model to integrate the country into the global economy, was attained in 2003 when Cambodia secured its membership to the World Trade Organization.

Institutional evolution wise, the last eight years legal and judicial reforms have moved to center stage as an important priority on the development agenda of Cambodia, with perhaps as a backdrop, the hard lessons from Asia's unprecedented historical evolution, whether from the perspectives of industrialization, urbanization, and the increasing division of labor altered society, the economy and politics. *Internally*, increasing complexity of social interactions due to growing democratization, rapid urbanization, and market reforms have created unprecedented demands by the private

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<sup>38</sup> The conference established the International Committee on the Reconstruction of Cambodia (ICORC), a consultative body and international mechanism whose members comprised countries and organizations contributing to Cambodia's development. It was the formation of ICORC, with the assent of the leaders of Cambodia's factions, that initiated the process of placing Cambodia's future development orientation in the hands of foreign governments and multilateral organizations or in recent parlance the so-called 'development partners'. See especially David M. Ayres, *Anatomy of a Crisis-Education: Development and the State in Cambodia* (2000) 46-66.

<sup>39</sup> Peou argues that:

The best that can be said for the UN role in democratizing Cambodian politics, particularly as a result of the direct intervention by the UN Transitional Authority in Cambodia (UNTAC) in 1992-1993, is that it has been positive but modest.... Obviously Cambodia was hardly a country that could be transformed into a democracy overnight, given its centuries-old undemocratic leadership culture and poor socio-economic conditions.

See Sorpong Peou, 'The UN's modest impact on Cambodia's democracy' in Edward Newman and Roland Rich (eds) *The UN role in promoting democracy: Between ideals and reality* (2004) 257-58.



sector for an improved definition of rights and obligations, and thus the need for better dispute resolution services, aside from the formal court system. *Externally*, demand-side pressures from external competitive markets and international commitments resulting from Cambodia's membership in ASEAN and its recent accession to WTO have led over time to greater demands for improved performance. Moreover sustained relationship with the international development community has also generated the pressure for greater transparency and accountability in the government.

#### **4. *Cambodia's legacy of legal transplant***

Again, many unique factors make review of the Cambodian laws and legal institutions difficult. The current shape and structure of the Cambodian legal system is largely the outcomes and by-products of historical distortions, the most extreme of which took place during the genocidal regime of Pol Pot.

The Cambodian legal system has evolved over time through a series of contributions from various legislative sources, beginning in the early days with customary rules of Asian origins, then the French legal system introduced during the period of the French protectorate, the socialist influenced civil law traditions, the transitory laws of the United Nations Transitional Authority of Cambodia (UNTAC), and finally the contemporary mixed legal systems of the constitutionally elected Kingdom of Cambodia.

Before the establishment of the French protectorate, social rapports in the countryside are exclusively governed by customary rules. These rules have been progressively developed by the Cambodians, generally on a consensus basis and at the local level, through their traditional norms. These customary rules are unwritten in nature and are the product of the history, the culture and the beliefs of the Cambodians.

With the installation of the French protectorate, in 1863, the formal "modern" legislation, originated from France and more or less customized to local conditions, was introduced. Patterned after the civil law courts of France, it touched all sectors of the political, economic and social life. However, until in the middle of the 20th century, its real impact on the rural was minimal as the farming collectivities remained largely subjected to local customs. The modern legislation was applied

mostly to the exploitation of natural resources, state activities or private enterprises.

Up to the mid 1970, few changes were instituted after Prince Norodom Sihanouk achieved Cambodia's independence in 1953. The radical genocidal years of 1975-79 saw a complete eradication of all existing laws, ancient and modern. During the decade that followed, adopted laws were clearly inspired from the socialist planned economy model.

In 1989, a constitutional amendment marked the beginning of a period of decollectivisation and the progressive passage to the market economy. This process was subsequently affirmed in the 1991 Paris Peace Accords, and ultimately in the 1993 Constitution of the Kingdom of Cambodia. From then on, the Cambodian legal system was based on the economic and political principles of a liberal democracy.<sup>40</sup> Transplanting foreign laws and assimilating Cambodian law with international practice immediately started with the advent of the UNTAC presence. While foreign scholars continued their debate on the heritability of law, the Cambodian law-makers were facing at that time more pressing tasks of building a new legal system and making laws, almost out of nothing — thus explaining why foreign legal terminologies, structures, and methodology found their way into Cambodian laws in such an unprecedented pace.

However, legal transplant of entire legal system to a country with a very different cultural, economic, and sociopolitical background did not come without a cost.<sup>41</sup> Utilitarian use of foreign law has also caused distortion and difficulties. Transplanted laws were not easily internalised by the Cambodian society thus explaining why many laws were adopted but remained dormant on the book for many years.

In a confidential memo to his superior, an UNTAC legal expert stated the following:

“...While I do not disregard the obvious importance of ensuring that laws and regulations are put in place during the transitional period, in order to ensure the establishment of an

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<sup>40</sup> Siphana Sok and Denora Sarin, *Legal System of Cambodia* (1998) 17-19.

<sup>41</sup> The Cambodian experience is not much different from other countries where whole transplant have taken place. Trubek and Santos argues that ‘more generally, a reason for being attuned to cultural differences is that law and legal institutions introduced, in the name of good governance, into developing countries that are at odds with local culture are unlikely to succeed.’ See David M. Trubek and Alvaro Santos, *The New Law and Development: A Critical Practice* (2006) 63.

environment conducive to the holding of free and fair elections, I am of the opinion that our good intentions may be defeated by the very inadequacy of the measures we take and the unacceptable or inappropriate laws and regulations we may, as a result, propose to, or impose on, the people of Cambodia in complete or partial disregard of the laws and regulations already in existence in the country and within the existing administrative structures, which laws and regulations it is our duty to study, analyze and make proposals for reform or amelioration, if necessary, to fit with the purposes and objects of the Paris Agreement..... This, in addition, has brought about the increasing perception that UNTAC is assuming colonial-like functions in this country by acting in disregard of the fact that laws and regulations existed here prior to her arrival.”<sup>42</sup>

A decade later, legal transplant continues unfortunately at time with a “colonial-like” approach, some inadvertently made by overzealous legal advisers and some perhaps with a subtle donor policy directive.

##### ***5. The influences of the neo-liberal modernist theory, the rational choice institutionalism theory and the accompanying ‘RoL’ movement***

Since the Paris Peace Accords, many bilateral and multilateral donors have assisted the Government of Cambodia in rebuilding the nation’s legal and judicial systems. As part of an overall package of reconstruction assistance, external agencies have sought the re-establishment of a governance framework by strengthening government institutions, restoring law and order, and enabling civil society organizations to work more effectively. In brief, their belief are at the core of the shared assumptions of modernisation and rational choice theory which stress that the growth of legal institutions is a product of the process of economic and social modernisation, mediated by the growth of commercial interests.

The legal assistance projects are to a large extent influenced by the neo-liberal modernist movement, which has always acknowledged the gaps between transplanted legal theory and reality. On the one hand these projects are designed to fill these gaps while on the other hand they are aimed at stimulating social, political and economic institutions to foster development. Influenced by these views, Western legal assistance to Cambodia attempts to refashion through capacity building existing institutions into

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<sup>42</sup> M. Ikomi Ngongi, Internal memo dated 14 October 1992.

the neo-liberal mould.<sup>43</sup> Along the laws-legal institutions-implementation continuum, the depth of RoL reform projects have achieved primarily the first two level, leaving the last part, unfortunately, to a large extent unsuccessful.

The first part of the reform continuum concentrates on the laws themselves. Projects are overwhelmingly concerned with revising laws or whole codes to weed out antiquated provisions, perfecting legislative drafting, establishing a normative legal framework. Clearly the economic domain is the focus, with the drafting or redrafting of business laws, taxation, intellectual property, and financial markets. To a lesser extent is the focus on criminal law and criminal procedure codes.

The second reform part is the strengthening of law-related institutions (particularly the courts, usually to make them more competent, efficient, and accountable), increasing the number of lawyers, revitalizing legal education along Western models, broadening access to courts, and establish alternative dispute resolution mechanisms. Training and salaries for judges, prosecutors, and court staff are increased. Other RoL projects have also included strengthening legislatures, executive branch agencies like the tax and customs administrations, and provincial and local administrations. Enormous amount of assistance are extended to civic society groups and nongovernmental organizations that use law to advance social reforms.

The last part of the reform continuum, which aims at the deeper goal of increasing government's compliance with law, have met with less success. Irrespective of the technical or institutional achievements, and the impetus from the grassroot driven human rights and anticorruption campaigns, sweeping changes in the values and attitudes of those in power did not take place fast enough. Genuine judicial independence, meritocracy, mandating transparency and other means of increasing accountability remain still a distant goal.

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<sup>43</sup> Many RoL projects and programs consist of diagnosing the shortcomings in selected institutions and then attempting to modify or reshape those institutions to fit the desired model. For example, if a court lacks access to legal materials, then those legal materials should be provided. If case management in the courts is dysfunctional, it should be brought up to Western standards. If a criminal procedure law lacks adequate protections for detainees, it should be rewritten. The basic idea is that if the institutions can be changed to fit the models, the rule of law will emerge.

Because of limited government capacity, fragile political balances — especially at the early stages of democratic development, and extreme time pressure, legal and judicial reform work in post-conflict Cambodia involves high risks of reversals, setbacks and failures. These factors explain to some extent why the government, with the support of the international community, has engaged in a set of complex governance reforms including public financial management, decentralisation and deconcentration, public administration, and legal and judicial reform.

**C. *Effects of the external and internal factors on the Cambodian experience***

The various factors highlighted above, both external and internal, have created a sort of ‘push and pull’ effect, which is shaping and giving credence in many respects to the possibility that Cambodia has indeed the necessary ingredients and possibilities to skip the learning curve. Internally, how Cambodia chooses to affect its institutional and cultural changes will almost invariably result in the acceleration or deceleration of its economic growth. Externally, how it responds to these outside events will largely determine the country’s political and economic course.

In terms of internal factors, how Cambodia conceptualizes its economic needs depends crucially on open public debates and discussions, the guaranteeing of which requires insistence on basic political liberty and civil rights. Cambodian policymakers will be hard pressed, on the one hand, not to listen to the greater plurality of voices and interest groups competing for attention and, on the other hand, not to provide responses on a host of domestic issues such as high levels of poverty haunting the citizenry, inherent weaknesses within the country's economy and institutions, and limited human resources. How Cambodia secure new sources of economic growth depends on its will to review the country existing development paradigm, the so-called “poverty alleviation” mindset, in favor of new ones like “wealth creation” or “improved productivity” through good governance.

Externally, as a small economy Cambodia will, time and time again, be subject to the whims of external forces. The mid 1990s Asian financial crisis has forced the Cambodian policymakers to rethink the financial, trade and investment linkages that

connect regional economies. Once again the world economy is now facing uncertain times.<sup>44</sup>

After several years of robust growth, the world economy is now facing some serious challenges in sustaining its brisk pace. The end of the housing bubble in the United States of America, as well as the unfolding sub-prime mortgage meltdown in 2007, the decline of the United States dollar vis-à-vis other major currencies, and high oil prices will all threaten the sustainability of global economic growth in the coming years. The recession in the United States would translate directly into a curtailment of import demand in the United States for foreign goods and services. The direct impact would be felt most strongly by those countries that have a large share of their exports in the United States market, and in particular for lower-income countries like Cambodia whose exports are highly concentrated in apparel.<sup>45</sup>

The willingness of the world's richer countries to target the needs of developing countries in the context of the Doha Development Agenda (DDA) is helpful, but the outcome of these negotiations is still uncertain. Cambodia can only but put a lot of its hopes on the successful conclusion of the DDA. In terms of development assistance, the shift in development thinking in the coming half-century will mean that aid effort will be smaller and must be better focused. Competition for scarce resources will be fierce and aid utilization will need to be more effective than before. ODA will most likely be less of an entitlement but more driven by real MDG achievements and medium-term progress. Again as an LDC, Cambodia counts on the expansion of trade as a potent tool for poverty reduction and for meeting its commitment under the MDGs.

Combined together, the external global prospects and the internal growing democratization forces highlight the urgency for Cambodia to speed up its governance

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<sup>44</sup> See, eg, United Nations, *World Economic Situation and Prospects 2008* (2008); World Trade Organization, *World Trade 2007, Prospects for 2008* (2008); United Nations Conference on Trade and Development (UNCTAD), *Report of the Secretary-General of UNCTAD to UNCTAD XII*, above n 15.

<sup>45</sup> The United States is Cambodia's largest export market accounting for \$1.85 billion worth of goods year to date through September 2007. Cambodia's primary exports to the United States are knit and woven apparel. See USTR, 'USTR Schwab Visits Cambodia To Hold First Ministerial Meeting Under Trade And Investment Framework Agreement' (Press Release, 21 November 2007).

and other reforms. Cambodians must balance change and consolidation. The conventional development goals of effectiveness, equity and efficiency have to be balanced off against goals to do with stability, security and the avoidance of internal conflict. State institutions must develop legitimacy as well as competence. What is needed is a concerted effort to strengthen, and in many cases to build from scratch, the foundations of a modern chain of accountability.

Such a reform effort will necessarily take a long time to implement, far longer than the life of Cambodia's current government. It calls for patient, sustained attention, as breaking down entrenched political interests, transforming values, and generating enlightened, consistent leadership will take generations. Western nations and multilateral donors have poured hundreds of millions of dollars into reform, but outside aid is no substitute for the will to reform, which must come from within. The primary obstacles to such reform are not technical or financial, but political and human. Cambodian leaders must first want to reform and must then be thorough and patient in their legal makeovers. But if the current trends in governance can be altered, and if the foundations are laid in a few key areas for enhancing accountability, a good beginning for convergence will have been made and strong signals of hope could be sent to all players in the economy and to the outside world that the opportunities for skipping the learning curve are in fact a reality.

In sum, the combined 'push and pull' effect invariably validates the strength of the *differentiation hypothesis* as the dominant hypothesis, overshadowing to some extent the convergence and the divergence hypotheses. While Cambodia has the necessary ingredients and possibilities to skip the learning curve or leap frog, the Cambodian experience of the past will continue its path-dependent trajectory well into the next generation affirming in the process that indeed Cambodia will leap frog, not at a fast pace had the convergence hypothesis be validated, but with a *minimalist* quantum.

#### **D. *Originality of the thesis***

A scan over the written materials on Cambodia over the past half century reveals an abundance of studies, analysis and eyewitness accounts emerging from scholars, government agencies, international aid organizations and NGOs on a wide variety of

subjects ranging from history, UN peace keeping, economic development policies and approaches to tackle poverty alleviation. Books about the French colonial period and the Khmers Rouges' savage utopia are plentiful. Many books have been written about the UN's Role in peace-building and the development of democratic governance in Cambodia. The post Paris Peace Accords witnesses a flurry of stock taking exercises and preliminary policy analysis and prescriptive recommendations on economic rehabilitation and stabilization, privatization, institutional rebuilding, agricultural revival, military demobilization, land reforms, forestry and fishery reforms. Generally, many of these attempts have been towards finding micro-management type solutions to their respective issues. The shaping of policy has been influenced to a large extent by outside guidance and specific agenda, and most of the time in isolation.

The next wave of reports and studies places more emphasis on sustained economic development and poverty alleviation, agricultural modernisation, the building up of the legal framework to support economic growth, promotion of private sector development, decentralization and good governance with a timid introduction to the issue of corruption. The last wave of studies and policy recommendations, stimulated by a combination of political and economic stability and the deepening of democratic acculturation, the discovery of new natural resources and the advent of global economic competition, marks a forceful attempt to tackle a number of governance-related issues arising from a more sophisticated political and social environment and a dynamic external environment. The focus on sustainable and inclusive growth, legal and judiciary reforms became more dominant in the various analysis. Systemic solutions with cross linkage of issues and long-term strategies, in addition to micro-management type approaches, began to emerge but are not yet in-place. Implementation remains partial.

The originality of this thesis stems from the effect of the synthesis of two dynamic analytical factors. At the research level it stems from the breadth and the depth of the topics covered (legal development, economic development and economic policy, culture and politics spanning over seven policy periods placed over the background of legal and economic global development). At the analytical level, it stems from the comprehensiveness of the Cambodian experience tested against four solid hypotheses



(convergence, divergence, differentiation and irrelevance hypotheses). The synthesis of these two elements generates a series of complex causal links and effects intertwined between law, economics, politics, history and culture. Arguably, the originality of this thesis lies in the way the author seeks first to understand, through a multi-dimensional lens, *la problématique* of Cambodia's long term economic development, and second to provide a long term coherent systemic solutions to the wider issues of nation building.

After all, Cambodia is in many ways, after decades of war and authoritarian government, still a post-conflict society and political system. The three-fold transition that began in the late 1980s - from civil war to peace, from one-party rule to multi-party democracy, and from economic isolation to integration - has given rise to complex and often conflicting forms of relationship between the various actors: the 'formal' Cambodian world of the modern public sector; the 'informal' neo-patrimonial Cambodian world of informal networks and influential patron-client relationships; and the 'external' world of donors, development agencies and NGOs who come in all shapes and sizes and represent different development attitudes, different institutional and national self-interests. This thesis is, in some ways, an attempt to bring a sense of neutral and impartial assessment of the interactions between these various actors and their effects on Cambodia's current economic landscape as well as a realistic projection of Cambodia's future prospect for growth. The question on 'skipping the learning curve or leap frogging' is an additional gauge to test, or to put in perspective, the speed of past reforms and the time horizon confronting Cambodian policy makers in their choice for moving forward. How they effectuate their policy choices and decide on the speed and scope of their policy implementation will invariably accelerate or decelerate the country's economic growth.

## **V. ORGANIZATION OF THE THESIS**

This thesis is organized into four parts and 11 chapters including this introductory chapter in which the conceptual framework is defined.

Part I, comprising two chapters, provides a historical account of Cambodia's economic and legal development efforts since the French protectorate period. The two chapters should enable readers not familiar with the Cambodian context to better understand the thesis as a whole as well as provide a better sense of the analysis shaping around the various hypotheses. Chapter II begins with a brief description of Cambodia's economic and historical context, hence establishing the premise to explain Cambodia's economic performance, followed by a summary of economic policies and development during the various policy periods. The chapter reviews key economic policies since the 1993 Paris Peace Accords, including trends in foreign aid, FDI and tourism, and discusses the factors behind the rapid expansion of garment exports.

Chapter III reviews Cambodia's experiences on law and economic development. It highlights the legal change and their respective impact during the seven distinct various policy periods since Cambodia's independence in 1953. The chapter discusses in depth key legal development since the Paris Peace Accords and highlights the broad accomplishments of the government along the line of the major development themes. Changes in the development of the judicial system are also covered including the various accompanying institutional reforms.

Part II, comprising five chapters, provides arguments in favor or against the various hypotheses. Chapter IV looks at the various factors of economic convergence which include the role of policies, trade, and aid during the period 1991–2007. Historical growth factors and recent Asian experiences and the degree of catch-up with their Western counterparts are covered. Cambodia's growth experience pointing to a case of economic convergence is discussed.

Chapter V looks at the causal relations between legal development and economic development, and highlights their general trends. Various factors in support of legal convergence are discussed. The chapter provides some elements of the Cambodian experience which makes a case for legal convergence while Chapter VI conversely argues for a case of legal divergence.

Chapter VII discusses in details the driving factors for institutional divergence. A strong case for institutional divergence is made looking at the roles of the military and the civilian state apparatus in the Cambodian post conflict governance. The effects of militarization and the dearth of institutions provide further support for a case of institutional divergence.

Chapter VIII argues that, legal and institutional convergence and divergence notwithstanding, the observed patterns of change in recent years in Cambodia tend to support also the differentiation hypothesis with culture being the differentiation factor.

Part III is comprised of 2 chapters. Chapter IX reviews the various policy choices and actions for leap frogging process. For each policy choice, the chapter provides adequate policy justifications while the various policy actions are built upon the foundations of previous accomplishments made. Chapter X provides ideal outcomes to be achieved over the next two decades.

Chapter XI concludes the thesis with a summary of findings as well as a few provocative thoughts on the way forward for the country.

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**CHAPTER II:**

**CAMBODIA’S EXPERIENCES ON ECONOMIC  
POLICIES AND DEVELOPMENT**

## **Chapter II:**

# **Cambodia's experiences on economic policies and development**

### **I. INTRODUCTION**

For several centuries well into the beginning of this millennium, Cambodia was the seat and centre of political and cultural influence for all its surrounding areas. Famous monuments like the Angkor Wat bear testimony to Cambodia's past glory.<sup>46</sup> Even during the colonial period till the middle of 20th century, Cambodia was a prized jewel with its beauty and natural resources, minerals and abundant fertile land, its friendly people and their enduring traditions and culture.<sup>47</sup>

However, since the mid-1950s the cold-war induced international climate and tensions caught Cambodia unawares, making it a pawn in power struggles and spawning disastrous forces inside resulting in tragic consequences.<sup>48</sup> In mid-1970, unprecedented trauma and catastrophe struck Cambodia. In just three years, a genocidal regime destroyed the country's long established traditions, as well as its political, financial and social institutions.<sup>49</sup> Emerging from this darkest period of its

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<sup>46</sup> There is only one eyewitness account of the Angkorean Empire during its heyday. This is the chronicle of the Chinese diplomat Zhou Daguan (Chou Ta-Kwan). Zhou provides a vivid record of his visit to Cambodia for several months in 1296-97. See Zhou Daguan's *Cambodia: The Land and its People* (ed. and tr. Peter Harris) (Chiangmai, 2007).

<sup>47</sup> Books about the French colonial period (1863-1953) are plentiful. See in particular John Tully, 'France on the Mekong: A History of the Protectorate in Cambodia' (2002) ; Paul Collard, *Cambodia and Cambodians: The Metamorphosis of the Khmer Kingdom by the French Protectorate Method* (2001) [trans of: *Cambodge et Cambodiens: Metamorphose du royaume khmer par une methode francaise de protectorat*].

<sup>48</sup> A number of writers have written good accounts of the 'Sihanoukist' period between the winning of independence in 1953 and the Lon Nol coup in 1970. The best book of all on the period, full of fascinating details and insights, is David P. Chandler, 'the Tragedy of Cambodian History; Politics, War, and Revolution since 1945' (1991).

<sup>49</sup> Many books have been written about the Khmers Rouges' savage utopia. The following titles provide a good understanding of the period: Ben Kiernan, 'How Pol Pot Came to Power: a History of communism in Kampuchea, 1930-1975' (1985); David Chandler's previously cited *Tragedy*; David Chandler, 'Brother Number One: a Political Biography of Pol Pot' (1993); Philip Short, 'Pol Pot: The History of a Nightmare' (2004) ; Michael Vickery, 'Cambodia: 1975-1982' (1984). See also the Yale University Cambodia Genocide program website at <<http://www.yale.edu/cgp/resources.html>> at 30 June 2008.

history, and caught in the misperceptions of the cold war, Cambodia encountered international neglect and isolation for more than another decade.<sup>50</sup>

With the UN-brokered peace accord of 1991, and with overwhelming international assistance, general elections were held in 1993 with considerable success.<sup>51</sup> Yasushi Akashi, the UN Special representative stated that '[I]t is undeniable that a pervasive aspiration of the Cambodian people for peace and democracy after more than 20 years of the incessant strife was a major factor in enabling the United Nations Transitional Authority of Cambodia (UNTAC) to achieve its major objectives'.<sup>52</sup>

With the subsequent establishment of the Royal Government of Cambodia later that year, Cambodia was thus reborn for a fresh and robust lease of life. With the country at peace, Cambodia ushered itself into a new period of development and gradually integrated its economy within the region and the world. Cambodia became a member of the Association of South East Asian Nations (ASEAN) in 1999 and a member of the World Trade Organization (WTO) in 2003.<sup>53</sup> Joining WTO has marked the final step in bringing Cambodia back into the major regional and international organizations that govern international economic relations.<sup>54</sup> Cambodia has finally turned a corner of history and emerging into a new dawn of its future with a vibrant

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<sup>50</sup> The first detailed study of this period was by Michael Vickery, 'Kampuchea' (1986); See also the following: Evan Gottesman, *Cambodia after the Khmer Rouge: Inside the Politics of Nation Building* (2003); Margaret Slocomb, *The Peoples' Republic of Kampuchea: The Revolution after Pol Pot* (2004); Hun Sen, *The Ten-Year Journey: 1979-1989* (1988) [trans of: *Dop Chhnam ney Domnaeur Kampuchea*].

<sup>51</sup> The United Nations Transitional Authority in Cambodia (UNTAC) played an indispensable role in bringing to birth a new Cambodian polity based on the unity of all major factions except the Khmer Rouge. Despite some shortcomings and defects in its 18 month operation, UNTAC, considered as the largest peacekeeping mission in U.N. history, achieved most of its intended objectives with considerable success. Given the atmosphere of threat and intimidation, the conduct of elections in May 1993 was a surprising success. On the opening day of a six-day polling period, voters lined up in driving monsoon rains to cast their ballots. By the end of the week, some 97% of eligible voters had voted in Cambodia's first national election in 21 years.

<sup>52</sup> See, eg, Yasushi Akashi, 'The UN's Role in peace-building and the development of democratic governance in Cambodia: past, present and future' (Paper presented at the Conference on Lessons from the 'Cambodian experience, Glen Cove, 2 November 2005); See also William Shawcross, *Cambodia's New Deal, Washington* (1994); Trevor Findlay, *Cambodia: The Legacy and Lessons of UNTAC* (1995); Steve Heder and Judy Ledgerwood (eds.), *Propaganda, Politics, and Violence in Cambodia in the UNTAC Period* (1996); Curtis Grant, *Cambodia Reborn? The Transition to Democracy and Development* (1998); and Sorpong Peou, *Intervention and Change in Cambodia, Towards Democracy?* (2000).

<sup>53</sup> See WTO News: 2004, Accessions: Cambodia raises WTO membership to 148, 13 October 2004. Available also on <<http://www.wto.org>> at 30 June 2008.

<sup>54</sup> For a chronology of key political and economic developments see Annex I.

peace, ample national reconciliation and reborn democracy. Cambodia has since 1998 enjoyed a decade of largely unbroken macroeconomic stability and growth.

Notwithstanding macro-economic achievements, the development agenda remains daunting. Poverty rates remain very high with around 35 percent of the population remaining below the poverty line. Decades of destructive conflict, civil war, and economic, political, and social instability, have contributed to the widespread poverty that currently exists in the country, especially among rural dwellers. The conflict resulted in the destruction of infrastructure, human capital, and institutions, as well as a large proportion of Cambodians being displaced, maimed, orphaned, or widowed. The economic landscape reflects the deep imprint the country's genocidal past, as manifested by the lack of a host of factors such as inherent weaknesses within the country's economy and institutions, low technological application, limited human resources, low resource base for investment, poor standard of living and weak social and economic structures.

## **II. OVERVIEW OF CAMBODIA ECONOMIC AND DEVELOPMENT PERFORMANCE**

### **A. *Initial Economic Conditions: The Legacy of Cambodia's Genocidal Past***

From the point of view of the macro-economy, the legacy of decades of war, the Khmer Rouge regime, and the resulting breakdown of society that these entailed have resulted in several major challenges. Among the many tragic consequences of Cambodia's political history was a depletion of many of Cambodia's most skilled people – intellectuals, craftsmen, artists, engineers, and others – a reversion to an agrarian barter system, and the destruction of social, industrial, and infrastructure base.

On account of the genocidal period of the Khmer Rouge regime, Cambodia's demographic structure is special and bears large implications for macroeconomic development. The most important dimension relates to the age structure of the population. The age groups born prior to 1980 are relatively small, reflecting the suffering during the war and the Khmer Rouge period. Conversely, the age groups born post 1980, are relatively large, as a result of the baby boom which followed the

fall of the Khmer Rouge. With about 43% of the population under the age of 15, Cambodia has one of the youngest populations in the world.<sup>55</sup>

Beyond human and social capital, physical infrastructure is lacking. After nearly 30 years of war and conflict, Cambodia's infrastructure was left in ruins. Cambodia's indicators for road density, teledensity, electricity generation capacity, and availability of water are among the lowest in the East Asia and Pacific region.<sup>56</sup> The absence of public services has resulted in extremely high levels of self-provision of services at high cost, while the absence of a good quality road network in particular has excluded the rural areas from taking up market opportunities in domestic and non-domestic markets, as well as benefiting from greater access to goods and services.

Cambodia's reconstruction and development efforts placed in the context of several decades of war and civil strife are further compounded by the complete void in financial and economic institutions. During the Khmer Rouge regime, the economy reverted to an agrarian barter system, the industrial base and infrastructure were destroyed, and the banking system and domestic currency were abolished. Rebuilding began after 1979, initially within the framework of a centrally planned economy and a monobank system, supported by Soviet and Council for Mutual Economic Assistance (CMEA) assistance. Market-oriented reforms were introduced starting in 1985-86, including liberalization of prices, privatization of certain state enterprises, and the formal adoption of a two-tier banking system. However, the economic situation remained difficult given the withdrawal of external assistance resulting from the collapse of the Soviet bloc and continued civil conflict. The Paris Peace Accord of 1991 and the subsequent establishment of the UNTAC finally paved the way for Cambodia's renewed access to international financial assistance.<sup>57</sup>

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<sup>55</sup> See United Nation Population Fund at <[http://www.un.org.kh/unfpa/\\_about/briefing\\_kit.htm](http://www.un.org.kh/unfpa/_about/briefing_kit.htm)> at 30 June 2008.

<sup>56</sup> Public-Private Infrastructure Advisory Facility (PPIAF), *Cambodia Country Framework Report on Private Participation in Infrastructure* (2002).

<sup>57</sup> See UNDP, 'Comprehensive Paper on Cambodia (1992); World Bank, 'Agenda for Rehabilitation and Reconstruction' (1992); World Bank, 'Cambodia: From Rehabilitation to Reconstruction' (1994).

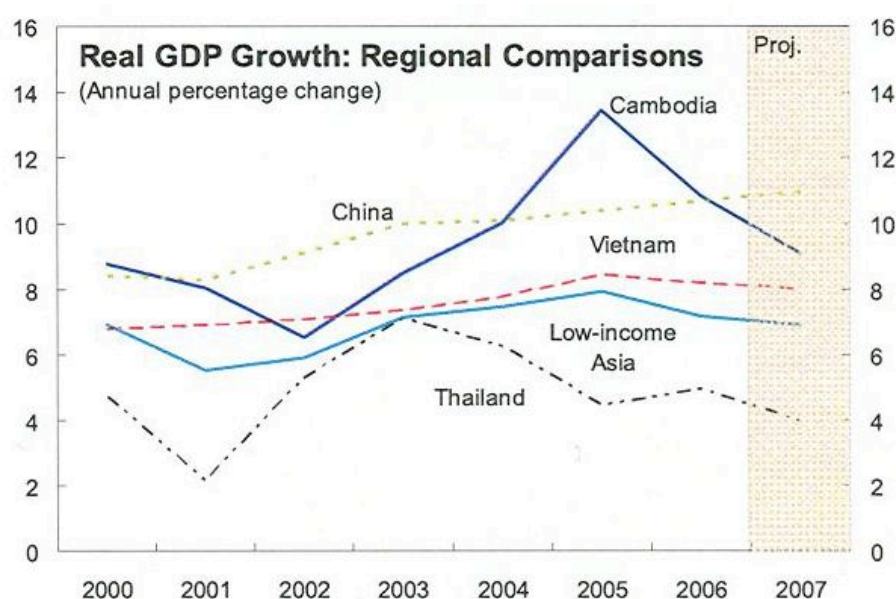


## B. Cambodia's Growth Experience

### 1. Overall Economic Performance<sup>58</sup>

The pattern of growth in Cambodia is consistent with historical development patterns in all developing countries, including today's developed countries. The rapid growth of the garment industry, in particular, has been a plus for export income and non-farm employment generation - both direct and indirect. During the 1994 to 2006 period, growth has been variable but high with annual GDP growing on average by 8.4 percent and recording a 10<sup>3/4</sup> percent in 2006.<sup>59</sup> GDP per Capita climbed from below USD 200 in 1994 to USD 512 in 2006. Cambodia's growth performance continues to be particularly strong and on overall macroeconomic management Cambodia has also continued to outperform other low income economies (See Table 2.1 and Table 2.2).<sup>60</sup>

**Table 2.1**



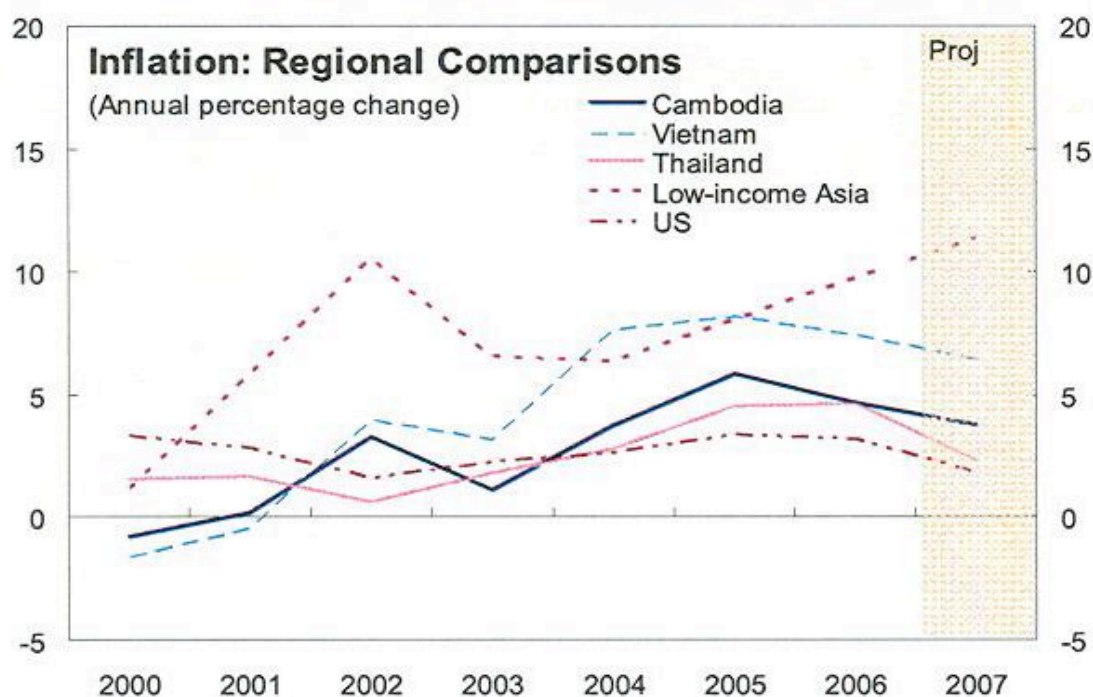
Source: IMF

<sup>58</sup> See the following documents: World Bank, *Cambodia: Rehabilitation Program: Implementation and Outlook* (1995); World Bank, *Cambodia: From Recovery to Sustained Development* (1996); World Bank, *Cambodia: Progress in Recovery and Reform* (1997); Ministry of Commerce, *Cambodia Business/Investment Handbook* (1996), (1997-98), (1999-2000); Royal Government of Cambodia, *Interim Poverty Reduction Strategy Paper (IPRSP)* (2000); Royal Government of Cambodia, *Cambodia: Integration and Competitiveness Study* (2001).

<sup>59</sup> For an annual assessment of the country macro-economic situation, see the International Monetary Fund (IMF) Country Report. Under Article IV of the IMF's Articles of Agreement, the IMF holds bilateral discussions with Cambodia, usually every year. See *Cambodia: 2007 Article IV Consultation—Staff Report; Staff Supplement; and Public Information Notice on the Executive Board Discussion*, IMF Country Report No. 07/290 (2007) 6.

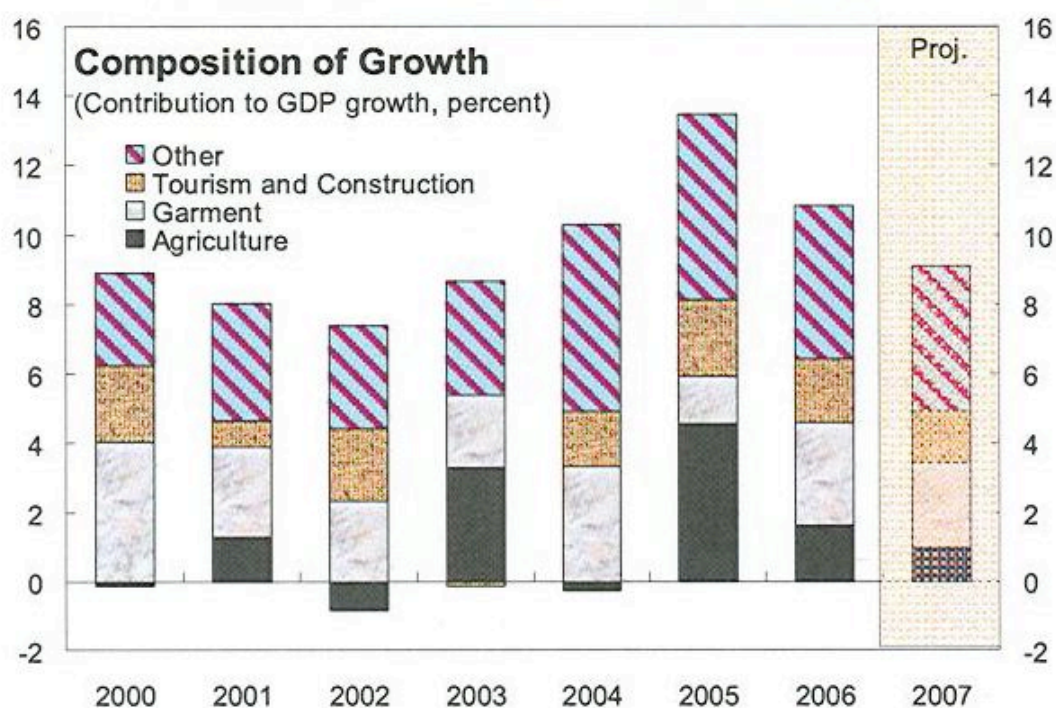
<sup>60</sup> World Bank Country Director for Cambodia Ian C. Porter, 'Concluding Remarks' (delivered at the 8<sup>th</sup> Consultative Group Meeting, Phnom Penh, 2-3 March 2006).

**Table 2.2**



Source: IMF

**Table 2.3**



Source: IMF

There are a number of factors underlying this performance (See Table 2.3): Garment exports have remained strong, in large part owing to the breathing room created by the imposition of safeguards measures by the United States on imports from China, as well as China's bilateral agreement with the European Union to restrain Chinese exports<sup>61</sup>; Tourism has continued to expand, and agriculture and fisheries output rebounded very strongly; and finally, prudent monetary policy implementation and a deepening of financial intermediation by the banking system has continued to support the expansion of domestic economic activity. Small businesses previously operating in the informal sector are increasingly registering and seeking bank finance, with vigorous construction activity reflecting a broadening of investment demand for real estate.

## 2. *Agriculture*

Cambodia is by far an agricultural country, evidenced by the largest share of the agricultural sector in the GDP and the highest level of absorption of employment. About 80 percent of the population earn their living from agricultural occupation. While the ratio of agriculture employment has remained relatively stable, trade liberalization, supported by an export-oriented policy introduced since 1993 and combined with the rise of the industrial sector, had contribute to substantially reduce the relative importance of agriculture in the economy. As a percentage of GDP, agriculture went down from 46% in 1997 to 33% in 2005. Rice farming and the cultivation of other crops, followed by fisheries, were and remain the major activities of the rural people.<sup>62</sup>

In 2005, the sector grew 16.6% due to excellent weather conditions although on average the sector grew only by 3.6 percent. The rate of growth, considered as far below that of the economy as a whole, can be explained by large year-to-year fluctuations, reflecting insufficient investment in the sector, over-exploitation of natural resources, and precarious weather conditions. Within agriculture, rice paddy

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<sup>61</sup> To give some indication of the importance of these measures, the safeguards measures imposed by the United States and the EU agreement cover around 87 percent of Cambodia's total garment exports.

<sup>62</sup> Economic Institute of Cambodia (EIC), *Export Diversification and Value Addition for Human Development* (2007) 6.

and other crops and fisheries are the leading sub-sectors with 18 and 11 percent of agricultural GDP, followed by livestock, poultry and forestry. Out of 2.7 million ha of cultivated land, 78 percent was devoted to rice, 6 percent to other food crops, 4 percent to industrial crops, and 6 percent to fruits and permanent crops.<sup>63</sup>

Provided there will be sufficient attention for increased investment and for improved efficiency and productivity, the sector has a good prospect for growth due to the potentially rich agricultural resource base, a vast land area for cultivation and human resource endowment. The agro-industrial sector arguably has the highest potential for creating broad-based employment. Agricultural output is substantial, particularly in rice and seafood, but a large share of output is not commercially marketed but sold informally to Thailand or Vietnam due to fragmented markets and uncompetitive domestic supply chains. Currently, four-fifths of the exportable rice crop is sold as unprocessed paddy.

### **3. *Industry***

The industrial sector has been the main engine of growth, increasing annually by average of 16 percent. With the influx of FDI associated with the government policy to support exporting industry, the industry sector as share of GDP has been on an increasing trend, moving upward from 11.6 percent in 1993 to 28.5 percent of GDP in 2005.<sup>64</sup> The sector consists mainly of the manufacturing sub-sector (78 percent) and the construction sub-sector (19 percent).

(a) *Garment* : The garment sub-sector has grown phenomenally due to the granting of the Most Favored Nation (MFN) status and the preferential access under the Generalized System of Preferences (GSP) by the United States and the European Union in 1997. Garment exports increased from \$28 million in exports in 1995 to over \$2.2 billion in 2006, employing over 300,000 people. The sub-sector received another boost in 1999 when Cambodia entered into the US-Cambodia Textiles Agreement, which provides for a quota on textile and apparel imports from

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<sup>63</sup> IMF, *Cambodia: Selected issues and Statistical Appendix* (2006).

<sup>64</sup> Ibid.

Cambodia. The textile agreement created an incentive to improve working conditions by providing for an annual increase in quota of up to 14 percent if labor conditions were found to comply with core labor standards embedded in Cambodia's Labor Law. Cambodia's exports to the US increased by 200 percent during the first two years of the Agreement.<sup>65</sup> By 2006, Cambodian exports to the US alone exceeded US\$1.5 billion. Employment in garments and textiles has been a major stabilizing force for the population and the economy in recent years, as the sector has absorbed a large number of skilled and semi-skilled labor, especially poor female workers who would have otherwise been unemployed or underemployed.

(b) *Construction*: With an average annual growth rate of 13% the sub-sector recorded the highest growth accounting for more than a third of the industrial sector. The relative importance of the sector can be explained by the fact that the country, emerging from a total civil war devastation, need to rebuild almost everything from the scratch, from private homes, commercial buildings and public facilities.

(c) *Extractives*: International firms have discovered quantities of commercially viable off-shore oil and gas reserves. While previously these had been located in zones subject to territorial dispute, recent discoveries are clearly located in the Cambodian territory. Cambodian reserves could contain as many as 2 billion barrels of oil and 10 trillion cubic feet of gas, which would make Cambodia the next untapped "hot spot" for multinational oil players.<sup>66</sup> Depending upon the world price of oil, Cambodian reserves may be contributing an estimated revenue of \$2 billion per annum — several times the current level of domestic revenue and ODA combined — within perhaps five to 10 years.

Recent interest has been shown in mining minerals in the North East of Cambodia. Geological and mineral investigations have indicated that Cambodia has significant

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<sup>65</sup> For the best account of the US-Cambodia labor experiment, see Sandra Polaski, 'Cambodia blazes a new path to economic growth and job creation' (Carnegie papers No 51, Carnegie Endowment for International Peace, 2004); and Regina Abrami, 'Worker Rights and Global Trade: The U.S.-Cambodia Bilateral Textile Trade Agreement' (Harvard Business School Case Studies, Boston, 2003).

<sup>66</sup> According to the Cambodian National Petroleum Authority, 6 oil and gas offshore blocks are now under accelerated development with 10 petroleum firms (Chevron, MOECO, GS Caltex, PTT E&P, Singapore Petroleum Corp, Resourceful Petroleum, Cooper Energy, Polytec, Zhuhai Zhenrong Energy, Medco, Kuwait Petroleum, GHL Petroleum and CNOOC).

resources in bauxite, gemstones, solid fuel minerals (coal and lignite), metallic and non-metallic minerals (chromium, ferum, manganese, gold, limestone).<sup>67</sup>

#### 4. *Services*

The service sector accounts for about 38.3 percent of GDP, and is heavily concentrated on trading activities, transport, communications, and tourism related services, which altogether comprise more than 50 percent of the total services sector. The sector grew at an average of 8.6% over the 2000-2005 period.<sup>68</sup> The growth acceleration that is projected for the medium term is driven by growth in all sectors, but heavy reliance is placed on service sector growth led by tourism. Cambodia is blessed to have one of the Seven Wonders of the ancient world that continues to attract visitors from around the world<sup>69</sup> topping 2 million in 2007. Over the last few years, the development in the tourism industry, stimulated by a massive hotel construction boom in Siem Reap, has made a significant contribution to economic growth by attracting foreign investments, creating jobs and generating income for the local people.

### III. EVOLUTION OF CAMBODIAN MACRO-ECONOMIC POLICIES

Against this historical backdrop, Cambodia's good economic performance was largely the results of the various policy choices affecting key economic growth factors, such as macro-fiscal policies, economic liberalization and institutional policies.<sup>70</sup>

<sup>67</sup> Cambodia has granted a variety of mineral exploitation licenses: 10 licenses for the prospecting of gold with Australian, Canadian and Malaysian companies; 6 exploration and exploitation licenses of gemstones, 5 limestone quarrying licenses; 2 iron ore licenses; 1 license each for silicate sand, coal, and bauxite.

<sup>68</sup> IMF, above n 63.

<sup>69</sup> Email Distribution Readers of Wanderlust, Britain's leading magazine for real travellers, have updated the millennia-old list for the 21<sup>st</sup> century. Overall, 3,569 travellers' votes were counted in the largest survey of its kind ever. The results reveal what today's travellers view to be the most extraordinary sights on the planet. The clear voters' favourite is the lost Inca city of Machu Picchu, Peru, which received 52% more votes than its nearest rival, the vast temple complex of Angkor, Cambodia. The Wanderlust Seven Wonders of the World, as voted by global travellers, are: Ranking No. 1 Machu Picchu, Peru; No. 2 Angkor, Cambodia; No. 3 Taj Mahal, India; No. 4 Petra, Jordan; No. 5 Grand Canyon, USA; No. 6 Great Wall of China, China; No. 7 Galápagos Islands, Ecuador. The Great Pyramid of Giza, the only one of the 7 Wonders of the World still standing, has been relegated to eighth place in the definitive updated list.

<sup>70</sup> Economic growth is a complex phenomenon. Pistor has summarized it as follows:

## ***A. Economic policy periods***

Over the 50 years after independence, Cambodia made fundamental shifts in government policies toward the economy. The Cambodian economy has had a chequered history of having a new economic system imposed virtually every decade since the 1960s. There was a spate of nationalisation of industries and banks in the 1960s, a free market system reintroduced in the early 1970s, two very different versions of central planning imposed from 1975 to 1989, and a free market system again put in place in the 1990s. For the purpose of this analysis the period of post-genocidal Khmer Rouge regime (1980-2007) will be used as the reference period.

### **1. *Post-Independence period (1953 -1975)***

During the French protectorate period, from 1863 to 1954, Cambodia was seen as a provider of raw materials and a buyer of finished products.<sup>71</sup> In the post-independence period, the Cambodian economy was initially dominated by the trade and investment patterns that was established during the French colonial rule. The economy was principally devoted to export-oriented agriculture. Rubber was the overwhelmingly largest component, but most of the country's production of corn, soybeans, sesame seeds, kapok, and pepper was also exported.<sup>72</sup> From 1955 to the end of 1969, under the leadership of the then led Prince (later King) Norodom Sihanouk, the industrialisation process began and Cambodia enjoyed a peaceful period of steady economic growth and security. It produced rice surpluses, established industries and constructed infrastructure — including the Sihanoukville deep seaport, a system of national roads and railways, power plants. The country witnessed the emergence of the first urban middle class.<sup>73</sup>

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Basic growth factors represent the underlying fundamentals of economic growth. They may be natural conditions, including natural resource endowment or geographical location. Alternatively they may be determined by basic political choices, such as the trade and investment regime, the quality of institutions, or investments in education and infrastructure.

Kastharina Pistor and Philip A. Wellons, *The Role of Law and Legal Institutions in Asian Economic Development, 1960-1995* (1999) 24.

<sup>71</sup> Tully, above n 47, 121-34.

<sup>72</sup> Collard, above n 47, 249-268.

<sup>73</sup> Russell R. Ross, *Cambodia: a Country Study* (1990) 146-149. See also Rémy Prud'homme, *The Cambodian Economy* (1969) [trans of: *L'économie du Cambodge*] which analyzes Cambodia's economy in the late 1960s. See also Khieu Samphan, *Cambodia's Economy and Industrial*

The Cambodian export economy did achieve some success in product diversification. In place of the reliance during 1944-1964 on crude materials such as rubber, hides, and vegetable fibers, by the mid-1960s the country was exporting organic chemicals, crude jute, headgear, shellfish, and artwork to the United States. Trade with the United States gradually displaced the country's former dependence on ties to France. While Cambodia was a relatively small U.S. trading partner, the United States was quite a significant partner to Cambodia, and an even more important provider of foreign assistance<sup>74</sup> — at least until Cambodia rejected further aid in 1963.<sup>75</sup>

In the late 1960s, the leadership of Prince Sihanouk faltered and social and economic progress lagged. A combination of unmet expectations, harsh restrictions against dissent, and growing corruption contributed to widespread discontent and the social cohesion of the Cambodian people began to erode.<sup>76</sup> In an effort to bolster his influence, he implemented a nationalization policy aimed at expanding the role of the State in the market economy. This forced a large number of foreign companies out of Cambodia, and seriously disrupted the development of Cambodia's market economy.<sup>77</sup>

The year 1970 saw the ouster of Prince Sihanouk from power by a U.S.-backed military coup d'état. A new regime called the Khmer Republic was installed in October 1970 with General Lon Nol assuming the position of President. The period 1970–75 was plagued by a civil war that brought development to a halt and a rapid deterioration of the Cambodian economy.<sup>78</sup> Farming areas were lost due to insecurity and conflict. The US bombing campaign of Cambodia destroyed significant portions

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*Development* [trans. Laura Summers (1979)], a translation of Samphan's Ph.D. dissertation, sometimes cited mistakenly as a blueprint for economic policies of the Democratic Kampuchea.

<sup>74</sup> The United States extended \$257 million in foreign assistance to Cambodia during 1955-1965, peaking at \$41 million in 1956. See Craig VanGrasstek, *Laws and Policies of the United States of America Concerning the Accession of Cambodia to the World Trade Organization* (2000) 3-5.

<sup>75</sup> See also Norodom Sihanouk and Wilfred Burchett, *My War with the CIA* (1973).

<sup>76</sup> Ayres, above n 38, 46-66. For a hostile treatment of the Sihanouk era that has stood up well, see Charles Meyer, *'Derrière le sourire khmer'* (1971).

<sup>77</sup> Ibid 47. See also Ross, above n 73, 146-149.

<sup>78</sup> For a account of the wartime economy see Ross, above n 73, 149-151.



of the countryside, contributing to the country's descent into instability.<sup>79</sup> The Lon Nol regime was destabilized and its hold on power was lost to the Khmer Rouge regime in April 1975 triggering the imposition of a complete trade embargo by the United States which were to last in effect for the next 17 years.<sup>80</sup>

## 2. *Khmer Rouge Regime (1975-79)*

On April 17, 1975, the Khmer Rouges took the capital city of Phnom Penh and quickly embarked on a utopian campaign to build a new society. During the Khmer Rouge regime, a Maoist communist system based on ultra-collectivism was implemented, with the objective of eradicating the old order represented by city people and the Buddhist religion. The entire urban population was forced to leave the cities and to work in the fields. An estimated 2 million people died, either from starvation, diseases, or were massacred.<sup>81</sup> The regime destroyed Cambodian society and left the country in a political, economic and social vacuum. "Year Zero" (1975) began with the elimination of money, markets, private property, and banks.<sup>82</sup> The economy reverted to an agrarian barter system, the industrial base and infrastructure were destroyed, and social services ceased. No market or trade existed and the banking system and domestic currency were abolished – symbolically the Central Bank building was even blown up. Private property rights were abolished, property records destroyed and urban properties laid to waste.

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<sup>79</sup> The U.S. bombing and subsequent invasion of Cambodia is the subject of William Shawcross, *Sideshow: Kissinger, Nixon and the Destruction of Cambodia* (1979). In-flight computer tapes from US aircraft involved show that 43,415 bombing raids were made on Cambodia, dropping more than two million tons of bombs and other ordinance in the period 1970-1975. These records exclude the B- 5 2 raids during the first eight months of 1973. For map and other details, see Phnom Penh Post, 14-27 April 2000, p. 13. See also Chandler, *Tragedy of Cambodian History*, above n 48, 202-206.

<sup>80</sup> U.S. Congress, House of Representatives, Committee on International Relations, Subcommittee on International Trade and Commerce, *United States Embargo of Trade with South Vietnam and Cambodia* (1975) 1.

<sup>81</sup> The figure is the one most often quoted by journalists. The People's Republic of Kampuchea (PRK) figures in 1983 estimated deaths at three million, but methods used to calculate this number were not reliable. Up to now accurate figures are still not available.

<sup>82</sup> The term "Year Zero" is famously coined by Father Francois Ponchaud in his book *Cambodia Year Zero* (1978).

### 3. *Reconstruction of the post-genocidal regime - Centrally planned economy (1979-1990)*

In 1979, after the overthrow of the Khmer Rouge regime, a new government was established under the name of People's Republic of Kampuchea modelling the Vietnamese socialist system. With civil war continuing, the Government's budget depended heavily on assistance from the Soviet and CMEA. Development efforts were initiated based on collectivism with the state owning and operating all enterprises and performing all foreign trade.<sup>83</sup> The administration kept real estate, natural resources, and all substantial enterprises under state ownership.<sup>84</sup> People had no legal title to land and ownership of land in previous regimes was not recognized. Commercial transactions were mainly conducted in the form of barter using gold or Vietnamese dong. Gold was used as a unit of account, medium of exchange and savings instrument. Subsequent to the re-establishment of the Central Bank in 1980, the riel was re-issued and circulated as the country's legal tender. However, confidence in the riel remained low, as the political structure and security situation remained unsettled.<sup>85</sup>

Slowly the Government accepted a larger role for private initiative, in particular by relaxing the collective organization of agriculture and by officially recognizing, in 1985, private enterprises beyond mere household production. Other early market-oriented reforms, which were introduced in 1985-86, included liberalization of prices, privatization of certain state enterprises, and the formal adoption of a two-tier banking system. Up until 1987 state-owned enterprises were the main entities engaging in trade, which was done almost entirely with former communist countries. From 1988, public-sector enterprises, which accounted for the bulk of domestic output outside agriculture, were in principle granted financial autonomy.

In 1989, after the withdrawal of the Vietnamese troops from Cambodia, a broad reform program was launched giving state-owned enterprises greater autonomy in directing and managing their own business, including financial autonomy. Private

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<sup>83</sup> Sub-decree No.9 concerning the establishment of a unit in charge of external trade transports under the Ministry of Commerce (19 June 1985).

<sup>84</sup> *Law concerning the safeguarding of State properties 1982.*

<sup>85</sup> Ross, above n 73, 155-172. See generally Margaret Slocomb, *The Peoples' Republic of Kampuchea: The Revolution after Pol Pot* (2004) 91-123.

sector activities were permitted, supported by the legal restoration of private property. Joint-venture enterprises — between government and private entrepreneurs or between domestic and foreign businesses — were also accorded official sanction in 1989. For the first time since 1975 foreign investors were encouraged and state enterprises were granted greater autonomy.

However, the economic situation remained difficult given the collapse of Eastern Europe, the break up of the CMEA,<sup>86</sup> the end of financial support from the former Soviet Union, and continued civil conflict.<sup>87</sup> Massive monetization of recurrent budget deficits during that period resulted in triple-digit inflation, in the range of 90-177% a year, and in a deep erosion of public confidence in the national currency. During 1988-91, the Vietnamese disengagement left the country in an unsettled political situation.<sup>88</sup>

#### **4. *Transitional period (1991-93)***

The Paris Peace Accord of 1991<sup>89</sup> and the subsequent establishment of UNTAC finally paved the way for Cambodia's renewed access to international financial assistance.<sup>90</sup> Large foreign exchange inflows associated with the return of refugees from abroad in the early 1990s and the extensive operations of the UNTAC in 1991-92 largely fueled soaring bank foreign currency deposits.

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<sup>86</sup> Cambodia received substantial budget support from the CMEA — about USD 16-17 million annually during 1989-90 and as much as USD 10 million in 1991. See World Bank, *Cambodia: From Rehabilitation to Reconstruction*, above n 57, 14.

<sup>87</sup> Ibid. See generally Eva Mysliwiec, *Punishing the Poor: The International Isolation of Kampuchea* (1988) for an attack on international indifference to Cambodia in the 1980s.

<sup>88</sup> See Gottesman, above n 50, 79-101, 271-300.

<sup>89</sup> United Nations, Department of Public Information, Agreement on a Comprehensive Political Settlement to the Cambodia Conflict: Paris, 22 October 1991 (DPI/n80-92077-January 1992-IOM).

<sup>90</sup> Cambodia's first steps on the path toward reintegration into the global capitalist economy were taken in June 1992, when Japan hosted the Ministerial Conference on the Rehabilitation and Reconstruction of Cambodia (MCRRC). The principal accomplishment of the conference was the establishment of the International Committee on the Reconstruction of Cambodia (ICORC), a consultative body and international mechanism whose members comprised countries and organizations contributing to Cambodia's development. Cambodia's arrears to the IMF, accrued during the 1970s, were paid by grants from bilateral donors, paving the way for an IMF loan only days later. See Ayres, above n 76, 163-4.

However, the transitional period was marked by a huge distortion created by the sudden and massive injection of external resources and influences. Within a short period, UNTAC brought some 20,000 foreigners to Cambodia to carry out the several tasks entrusted to it. This sudden, major injection of money into the economy, mainly in the form of rents and salaries, created negative distortionary consequences in the local labour market and the rental market in Phnom Penh and concomitant creation of a new rentier class. Both consequences gave rise to wide disparities between rich and poor that persist to this day. UNTAC was not the only entity responsible for these distortions; donor organizations, both governmental and non-governmental followed similar practices. Collectively, this sudden foreign influx - as well as some of the Cambodian returnees - gave rise to a new pattern of consumption and aspirations among a small elite that was at odds with the realities and needs of the economy.<sup>91</sup>

##### **5. *Post Peace Process – transition to a democratic and market economy (1993-2007)***

The post peace process witnessed a transition to a democratic and market economy. Formation of the coalition government following the UN-sponsored general election in May 1993 marked the beginning of a new era in the reform process. Assistance from leading countries in the Paris Club to help Cambodia clear its arrears with the IMF enabled the resumption of the relations with the latter. Cambodia's macro-economic development across the 1990s can be divided into two phases, the 1993-1997 period and the 1998-2005 period. The year 1997 marked a structural break because of the east Asian financial crisis and domestic political disturbances.<sup>92</sup>

The 1993-1997 phase of Cambodia's development marked attempts by a new administration to take control of fiscal operations in a country still divided by internal war, with only rudimentary fiscal administrative structures in place, inherited from the

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<sup>91</sup> See UNDP, *Comprehensive Paper on Cambodia* (1992); World Bank, *Agenda for Rehabilitation and Reconstruction* (1992); World Bank, *Cambodia: From Rehabilitation to Reconstruction*, above n 57.

<sup>92</sup> The analysis of the post peace process should be viewed with caution. In reality it was only beginning December 1999 that all areas of the country were truly pacified and accessible. It is, therefore, only possible to talk about a stable political environment since 1999. Thus while macroeconomic policy between 1993 and 1998 could be applied in secure areas of the country, many of the poor lived outside these areas. In those years factional fighting affected all areas of the country.

UNTAC administration. Following the May 1993 elections, the government began formulating a comprehensive macroeconomic and structural reform programme with support from the international community followed by a full blown National Programme to Rehabilitate and Develop Cambodia (NPRD).<sup>93</sup>

Major customs reforms were instituted and a taxation structure established. The bulk of revenues were generated by taxes on international trade and turnover taxes, with domestic excise accounting for a relatively small share. During the same period, pricing and exchange rates have been liberalized, macroeconomic stabilization was largely achieved, a two-tier banking system was introduced and subsequently reformed, prices freed, and the number of state enterprises was substantially reduced through privatization and leases. Trade policies were greatly liberalized. Restrictions limiting the ability of firms and individuals to engage in international trade were largely removed. Few restrictive quantitative restrictions or exchange controls remained and duties on imports and exports were for the most part are not prohibitive.

In 1994, the creation of an investment climate open to foreign investment was signaled through the passage of the Law on Investment (LoI), resulting in a substantial increase in FDI.<sup>94</sup> FDI grew from almost nothing in the late 1980s to an annual average of \$60 million in the first half and \$220 million in the second half of the 1990s due to its privileged access to the US and EU garment markets. Policy merging between the trade regime and foreign direct investment regime was developed to bring better coherence and efficiency. Cambodia signed numerous bilateral agreements to protect and promote foreign investments with many countries.<sup>95</sup>

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<sup>93</sup> The Government's development agenda as embodied in the NPRD emanated almost entirely from the MCRRC declaration and the key recommendations of the ICORC. While international financial institutions stressed the importance of market-based reforms in Cambodia to increasing output in major sectors of the economy, the Government's strategy embraced six mutually-reinforcing and interdependent fields of operation :

(i) Create a legal and institutional environment conducive to fostering the emergence of a strong private sector ; (ii) Achieve the stabilization and structural adjustment of the economy through macroeconomic controls ; (iii) Develop the human resources base with a view to strengthening the private sector ; (iv) Rehabilitate and build up physical infrastructure and public facilities in order to support investment ; (v) Open the country to international trade and private foreign investment in order to integrate into the regional and world economies ; and (vi) achieve rural development and the sustainable management of natural resources and the environment.

See specifically Royal Government of Cambodia, *National Programme to Rehabilitate and Develop Cambodia* (1994).

<sup>94</sup> See especially Hang Chuon Naron, *Investment Climate in Cambodia* (1995); See generally World Bank, *Cambodia: Rehabilitation Program: Implementation and Outlook*, above n 58; World Bank, *Cambodia: Progress in Recovery and Reform* (1997).

<sup>95</sup> See Siphana Sok (ed), *Cambodia Business and Investment Handbook* (1998).

Cambodia experienced two major crises in 1997, an internal political crisis (the events of 5 and 6 July) and an external economic crisis (the financial crisis in Asia). The July events, precipitated by conflicts between the two major political parties, changed fundamental conditions of domestic economic activities in the country. It caused a depreciation of the local currency, a sharp reduction in consumer spending, a decline of investment expenditure and a contraction of the tourism sector. Confidence in political stability was lost, the security and safety of citizens and enterprises were seriously threatened, and the future political environment became uncertain. The international community responded to the political turbulence by terminating or suspending their assistance, which directly affected Government expenditures.<sup>96</sup>

The adverse effects of the July events were compounded by the financial crisis in Asia, which erupted in Thailand and spilled over to other Asian countries such as Malaysia, the Philippines, Indonesia and South Korea.<sup>97</sup> The Asian crisis dramatically changed the external economic environment surrounding Cambodia. The realignment of foreign exchange rates in the crisis countries took place at an unprecedented pace, and affected the competitiveness of Cambodia's goods and services in domestic, regional and world markets. The economic slowdown in those countries gradually affected Cambodia's foreign trade and tourism, in particular through volatility of foreign exchange rates, which translated into price effects on the domestic market, a decline in the demand for Cambodian products in neighbouring countries and a sharp fall in tourism. However, the impact on exports, FDI and on the balance of payments were mitigated by a rapid growth of the garment sector following the granting of GSP derogation in July by the European Union and the granting of GSP status by the United States.<sup>98</sup>

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<sup>96</sup> Politically, Cambodia was denied membership of the Association of Southeast Asia Nations (ASEAN), and financially several international organizations and donors imposed a blanket suspension on all assistance, while others imposed a development assistance embargo similar to that of the 1980s, providing only humanitarian aid to those perceived to be most in need. See Ayres, above n 31, 150-151, 189; for more on the 1997 event see especially Kao Kim Hourn, 'Cambodia's Integration in ASEAN: Lessons Learnt and the Road Ahead' in Kao Kim Hourn and Jeffrey A. Kaplan (eds) *Dynamo or Dynamite? Cambodia's Future in ASEAN* (1999) 182-189.

<sup>97</sup> For the causes of the crisis see Takatoshi Ito, 'Growth, Crisis, and the future of Economic Recovery in East Asia' in Joseph Stiglitz and Shahid Yusuf (eds), *Rethinking the East Asian miracle* (2001) 62-91.

<sup>98</sup> See generally Kato, Toshiyasu, 'Learning from the Asian Economic Crisis' (Cambodia Development Review, Vol. 2, No.2, Cambodia Development Resource Institute, 1998); Chan Sopha et al, 'Impact of the Asian Financial Crisis on the SEATEs: The Cambodian Perspective' (Working Paper No. 12, Cambodia Development Resource Institute, 1999); World Bank, 'East Asia: The Road to Recovery' (1998).

With the successful implementation of the elections in July 1998,<sup>99</sup> the market reacted immediately and positively, and the riel appreciated from 4,200 to 3,200 to the dollar almost overnight. Since 1999, Cambodia enjoyed a period of relative political stability that allowed the Government to focus on achieving medium-term fiscal sustainability. Cambodia made significant progress in implementing a macroeconomic framework aimed at achieving equitable long-term economic growth and sustainable development. Key characteristics of the framework included maintaining macroeconomic stability, strengthening the banking and financial institutions, implementing fiscal reform measures, ensuring a sound management of public property, and increasing public investment to develop the physical and social infrastructure and human resource of the nation.<sup>100</sup>

Cambodia made impressive strides in strengthening political and economic stability and re-integrating itself into the international community. Membership in ASEAN in 1999 and the WTO in 2003 marked an important step in the development of the country external policy and a stepping stone for further economic integration.

#### **IV. KEY ECONOMIC POLICIES SINCE THE 1993 PARIS PEACE ACCORDS**

Following the 1993 Paris Peace Accords, the Cambodian experience seems to support *ex post* an outward-looking strategy of development (Open Economy strategy) which relies on market forces and the private sector to play a prominent role. The following sections provide a detailed analysis of the key macro-economic policies.

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<sup>99</sup> On the 1998 elections see Sophie Richardson, *The July 1998 Cambodian National Election* (1999); Caroline Hughes and Kim Sedara, *The Evolution of Democratic Process and Conflict Management in Cambodia: A Comparative Study of Three Cambodian Elections* (2004); Caroline Hughes, *The Political Economy of Cambodia's Transition, 1991-2001* (2003).

<sup>100</sup> See, eg, IMF, *Cambodia: Article V Consultation and First Review Under the Poverty Reduction and Growth Facility* (2000); IMF, *Cambodia: Letter of Intent, Memorandum of Economic and Financial Policies and Technical Memorandum of Understanding* (2001); IMF, *Cambodia: Fourth Review Under the Poverty Reduction and Growth Facility* (2002); World Bank, *Cambodia: Public Expenditure Review* (1999); World Bank, *Cambodia Country Assistance Strategy* (2000).

## **A. *Macro-economic policies***

### **1. *Fiscal Policy***

The Government's fiscal policy is to sustain macroeconomic and external sector stability by ensuring that current expenditures do not exceed current revenues and to avoid recourse to bank financing of the budget deficit. The period 1999-2005 in particular was also one in which several key changes were initiated in Cambodia's macro-fiscal structure, the most important of which was a concerted attempt to change the revenue structure, to reduce the share of taxes on foreign trade and to increase the share of taxes on domestic goods and services.<sup>101</sup>

The recent decision by the IMF to relieve Cambodia of US\$ 82 million in debt — based on its macroeconomic performance, poverty reduction strategy, and public expenditure management system — confirmed the progress.<sup>102</sup> The positive results could be attributed to the success of the Public Financial Management Reform Program which was initiated in 2004.<sup>103</sup>

### **2. *Monetary and exchange rate policy***

In the monetary sector, monetary development reflects the restricted feature of the monetary and fiscal measures. Since the end of 2000, claims on the government by the banking sector have been virtually eliminated. Credit from the central bank to the remainder of the banking system remains absent. The National Bank of Cambodia

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<sup>101</sup> See United Nations Development Program (UNDP), *Macroeconomics of Poverty Reduction* (2003) 115-143; See also K.P. Kannan, 'Economic Reform, Structural Adjustment and Development in Cambodia' (Working Paper No. 3, Cambodia Development Resource Institute, 1997).

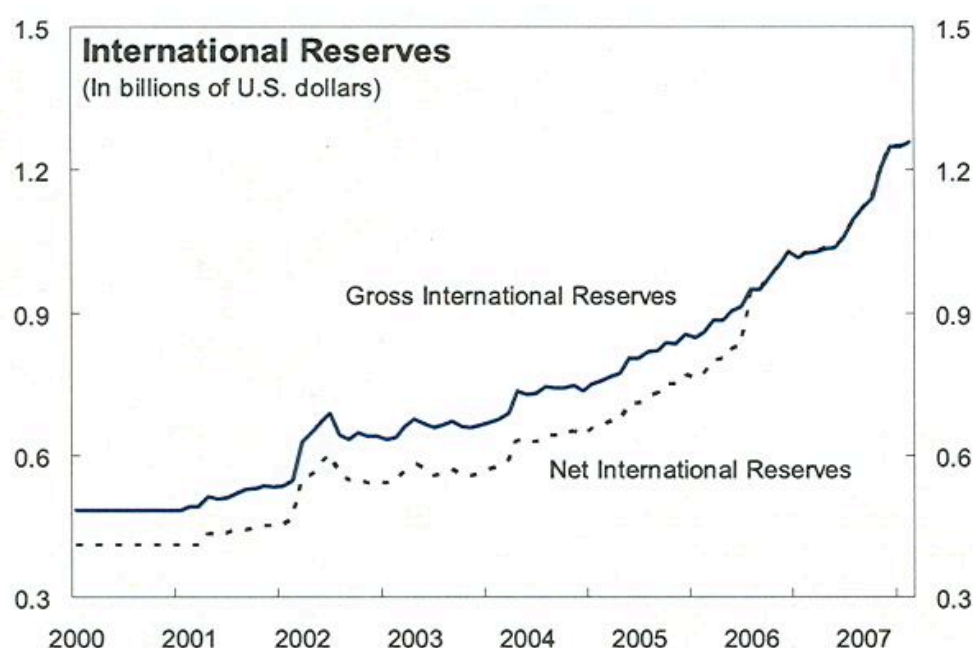
<sup>102</sup> Representative of the International Monetary Fund, 'Remarks on Macroeconomic Developments in 2005 at the 8<sup>th</sup> Consultative Group Meeting, Phnom Penh, 2-3 March 2006).

<sup>103</sup> Concrete results included the following: Overall government revenues boosted over the past few years to almost 12 percent of GDP; revenues have increased by 20 percent from 2004 to 2005; the amount of customs revenue collected through the banking system has increased from zero in 2004 to 36 percent in 2005, and 86 percent of all Tax Department revenue is now collected through the banking system; the stock of old expenditure arrears has been reduced by over 40 percent; the procurement process has been streamlined and tightened; five line ministries have established internal audit departments; and, for the first time in Cambodia, a pilot program has been launched to pay civil servants through commercial banks instead of by cash. See World Bank, 'Strengthening governance in Cambodia through enhanced public financial management' (Press release, 28 June 2006).



(NBC) has constantly accumulated its international reserves reaching a level exceeding US\$1.2 billion (See Table 2.4).<sup>104</sup> Growth in the country's gross international reserves has kept pace with the continuous increase in total imports of goods and services and reached more than three months cover in recent years. Inflation was kept within the target and in fact turned negative during recent period, while the value of the riel was largely stabilized as a result of a tight domestic credit stance.<sup>105</sup>

**Table 2.4**



Source: IMF

<sup>104</sup> IMF, above n 59, 9.

<sup>105</sup> Ibid. Annex I.3. Cambodia officially follows a managed float with no pre-announced exchange rate path, although since the beginning of 2007 the arrangement has resembled a *de facto* peg to the dollar. The official exchange rate, which is expressed in Riels per U.S. dollar, applies to all official external transactions conducted by the government and state enterprises and is used for accounting purposes by the National Bank of Cambodia; See also UNDP, *Macro-economics of Poverty Reduction*, above n 101, 74-114.

### 3. *Dollarization Policy*<sup>106</sup>

Dollarization while not the result of a policy decision is a consequence of low confidence that is exacerbated by prolonged uncertainty. So far dollarization was very useful in helping to stabilize the economic system and prevent capital flight. Other positive effects include the following: switching public practice from gold to banknotes denominated in US dollars thereby promoting monetization of the economy, promoting financial deepening, lowering the risk of currency devaluation, and facilitating Cambodia's international integration process.

On the negative side, dollarization of the Cambodian economy meant undermining the effective conduct of monetary and fiscal policy, damaging the pride of the nation, reducing the opportunity to earn income from seigniorage, and widening the gap between the urban dollar-based economy and poor rural areas where riel are normally used. Three separate phases in Cambodia's dollarization process are highlighted.

- In an initial phase (1991–96), the steady rise of dollarization largely reflected accelerated monetization and formal financial intermediation, against the background of increased capital inflows. Large foreign exchange inflows associated with the return of refugees from abroad in the early 1990s and in 1991-92 with extensive operations of the UNTAC largely fueled soaring bank foreign currency deposits.
- In a second phase (1996–97), increased political uncertainties and economic mismanagement led to capital outflows and a decline in foreign currency deposits, resulting in a measured decline in dollarization.
- In the third phase (1998–2004), notwithstanding, the low inflation and stable riel exchange rate, dollarization rose significantly again in line with economic recovery. Dollarization was particularly acute in urban areas, while demand for riel continued to rise steadily mainly in the rural areas.

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<sup>106</sup> For a full analysis of cost and benefits of dollarization for economic development and poverty reduction, see UNDP *Macro-economics of Poverty Reduction*, above n 56, 95-110; See also Mario de Zamaroczy and Sopanha Sa, 'Macroeconomic Adjustment in a highly dollarized Economy: The Case of Cambodia' (IMF Working Paper WP/02/92, International Monetary Fund, 2002).

## **B. *Economic integration and trade liberalization policy***

### **1. *Trade Policy***

Trade liberalization in Cambodia, combined with dollarization, since 1993 has resulted in significant expansion of exports and narrowing the current account deficit. Cambodia's general trade policy can be best described as an all out multi-tracks policy directed at an effective integration of the country into the world economy with accession to the WTO as marking the final step in bringing Cambodia back into the multilateral trading system.<sup>107</sup> Regionally, Cambodia acknowledged the dynamism of the Asia Pacific region in which it is situated and has pursued aggressively regional and bilateral opportunities in complement to its globalization approach. Its policy was designed to capitalize on the country's least-developed country (LDC) status with the greatest part of Cambodia's exports benefiting from various systems of trade preference such as the Generalized System of Preferences (GSP),<sup>108</sup> the European Union's "Everything But Arms (EBA)"<sup>109</sup> and the ASEAN Integration System of Preferences (AISP).<sup>110</sup>

The open door policy, combined with the lifting of the trade embargo, had a positive impact on the trade inflow, while the gaining of GSP status in 1997 was associated

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<sup>107</sup> See generally Ministry of Planning (MoP), *National Strategic Development Plan (NSDP), 2006-2010* (2006).

<sup>108</sup> The GSP was adopted by the GATT on 1 July 1971. It involves a set of tariff preferences for developing countries to encourage diversification of their economies. Tariff preferences are either generalized –normally granted by the majority of industrialized nations (nondiscriminatory) – or unilateral – not the result of negotiations with the beneficiary nations. The massive tariff reductions since 1971 as a result of multilateral trade negotiations and unilateral actions, as well as changes in productivity, have reduced the importance of the GSP to many developing country exporters, but it remains an important plank in the trade policies in many developing countries. (Walter Goode, 'Dictionary of Trade Policy Terms' (1998).

<sup>109</sup> The EBA is an initiative of the EU under which all imports to the EU from the Least Developed Countries (LDCs) are duty free and quota free, with the exception of armaments. The EBA entered into force on 5 March 2001. There are transitional arrangements for bananas, sugar and rice until January 2006, July 2009 and September 2009 respectively. The EBA is part of the EU GSP and its aim is to encourage the development of the world's poorest countries.

<sup>110</sup> Under the ASEAN Integration System of Preferences (AISP), the old 6 ASEAN members would unilaterally extend tariff preferences to ASEAN's new members beginning 1 January 2002. The AISP would be implemented on a bilateral and voluntary basis and would be based on products proposed by ASEAN's new members.

with the beginning of domestic exports.<sup>111</sup> Exports of textile products, clothing and other goods under GSP and MFN schemes increased from USD 28 million in 1995 to more than USD 2 billion in 2006. The industry is credited for employing about 10 percent of the labor force, or an estimate 300,000 workers, whose annual wages alone are estimated about USD 200 million in 2005.<sup>112</sup> While Cambodia's garment industry represented less than 1% of the global industry, it became the biggest hard currency earner in the country, representing 80% of exports and more than 14% of GDP.<sup>113</sup> The total foreign trade increased from USD 1.9 billion in 1998 to over USD 4 billion in 2006,<sup>114</sup> indicating a doubling of volume during the last six years, mostly to the US (See Table 2.5).<sup>115</sup>

The success of the industry could be attributed to Cambodia's dual policy decisions which recognized that, (1) at the end of the quota phase out in 2004,<sup>116</sup> it could not compete with countries like China on traditional factors like cost, quality, and speed to market, and (2) that it should position itself for a market niche as a safe-haven for buyers who care about their reputation. Increasing globalization in the 1990s had

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<sup>111</sup> Cambodia benefits from preferential access to the U.S. market, although in practical terms those preferences are of severely limited significance. The U.S. policy regime does not consist solely of normal trade relations (NTR) and non-NTR treatment. There is instead a more differentiated hierarchy of treatment for various U.S. trading partners. This "ladder of preferences" consists of seven distinct steps (See Annex 2.1). In 1992 Cambodia moved from the very bottom step (a trade embargo) to the second-lowest (denial of NTR treatment). The next steps were the extension of NTR treatment on an unconditional basis in 1996, and the granting of preferential treatment under the GSP in 1997. For more on the US trade policies on Cambodia, see VanGrasstek, above n 74, 8-10.

<sup>112</sup> For a detailed account of the garment industry in Cambodia see Asian Development Bank (ADB), *Phase I Report, Cambodia's Garment Industry: Meeting the Challenges of the Post-Quota Environment* (2004); For a socio-impact of the industry see ADB, *Garment Employees in Cambodia: A Socio Economic Survey, Prepared by the Cambodian Researchers for Development* (2004).

<sup>113</sup> World Bank, *Cambodia, Sharing Growth, Equity and Development Report 2007* (2007) 1.

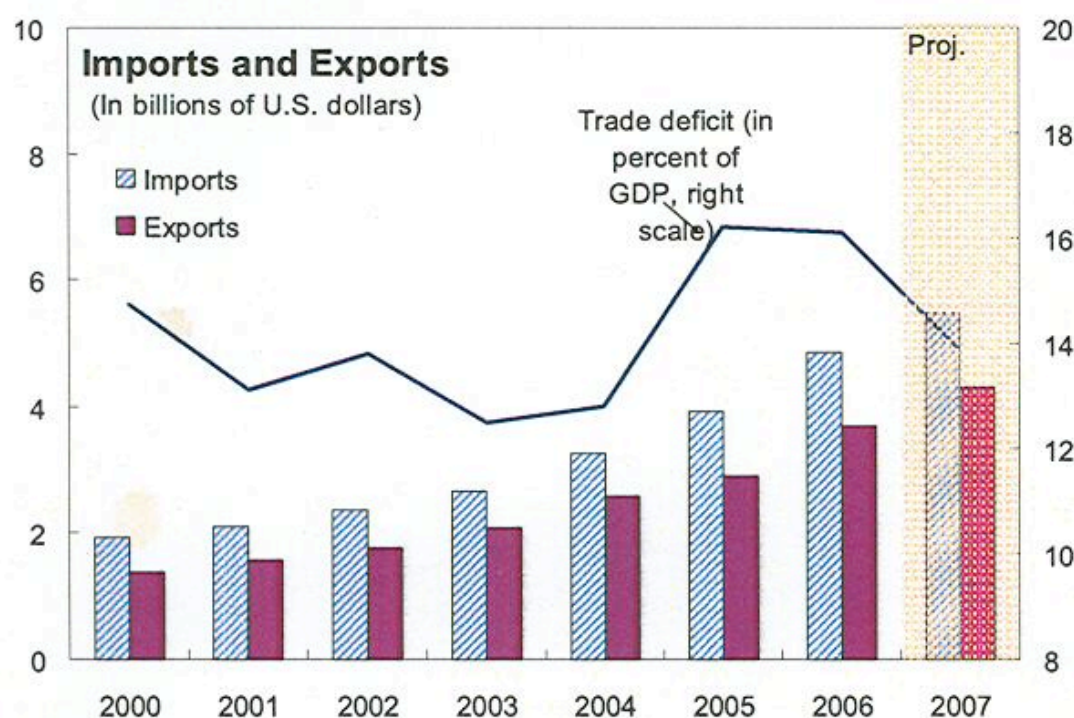
<sup>114</sup> IMF, above n 59, 8.

<sup>115</sup> Total two way goods trade between the United States and Cambodia amounted to \$1.95 billion dollars in the year to date through September 2007 and totaled \$2.2 billion in 2006. Primary U.S. exports include vehicles and machinery. The United States is Cambodia's largest export market accounting for \$1.85 billion worth of goods year to date through September 2007. Cambodia's primary exports to the United States are knit and woven apparel. See USTR, 'USTR Schwab Visits Cambodia To Hold First Ministerial Meeting Under Trade And Investment Framework Agreement' (Press Release, 21 November 2007).

<sup>116</sup> The quota system dates back to the 1960s and reflects the fact that these industries were important sources of exports, income, and jobs in many countries, both rich and poor. To address concerns of domestic industries and workers in rich countries, while allowing poor countries to grow out of poverty, a series of international agreements were negotiated over several decades that allocated shares of guaranteed access to rich country markets. As developing countries' capacity grew, they began to push for a phase-out of the system, and this was finally agreed in the negotiations that created the World Trade Organization in 1995. The quota system was completely eliminated on January 1, 2005. For more on the impact of the end of the quota system, see specially UNDP, *Sewing Thoughts: How to Realise Human Development Gains in the Post-Quota World, Tracking Report, Asia-Pacific and Investment Initiative* (2006).

brought greater awareness of working conditions around the world, and heightened public scrutiny of major U.S. firms, such as Nike. The sports equipment and rug industries, in particular, had come under severe attack for using child labor, prompting students and labor activists to establish new NGOs devoted exclusively to improving working conditions in overseas plants.<sup>117</sup>

**Table 2.5**



Source: IMF

The Cambodian policy experiment was put in place through two formal agreements: (1) the textile agreement between the United States and Cambodia that began 1 January 1999,<sup>118</sup> and (2) an agreement signed on 4 May 2000 between the ILO, the Cambodian government, and the Cambodian garment manufacturers to launch the monitoring initiative. The policy experiment was characterized by two key innovative

<sup>117</sup> For a larger perspective of corporate social responsibility, see Helen Campbell and John Sabapathy, *Trading Accountability: Business, Trade and Investment Policy and Sustainable Development* (2004).

<sup>118</sup> The text of the agreement states that:

both Parties sought to create new employment opportunities and improve living standards and working conditions through an enhanced trading relationship; affirm respect for each Party's legal system and seeking to ensure that labor laws and regulations provide for high quality and productive workplaces; and seek to foster transparency in the administration of labor law, promote compliance with and effective enforcement of existing labor law, and promote the general labor rights embodied in the Cambodian labor law.

policy instruments directly credited for the valuable results obtained in Cambodia: (1) the creation of a trade agreement that provides positive market access incentives as a reward for improved labor conditions; and (2) the inauguration of a new role in international governance for an international agency.<sup>119</sup> The experiment came at a time when the U.S. government was increasingly interested in linking trade privileges with support for labor rights.<sup>120</sup> U.S. and Cambodian negotiators worked out a three-year textile trade agreement for the 1999-2001 period that established quota limits on 12 largest categories of apparel exports.

However, in a unique step, they agreed that if the Cambodian government achieved substantial compliance by the apparel factories with national labor laws and internationally agreed labor rights, the new quotas would be increased on an annual basis.<sup>121</sup> With brand names such as The Gap, Banana Republic and Polo converging to place their orders in Cambodia and employment reaching records high Cambodia made history on two fronts: (1) international textile trade politics and (2) the global campaign to improve worker rights around the world. World Bank President Robert Zoellick, former U.S. Trade Representative, during his visit to Cambodia in 2007, stated that '[i]t was heartening to see the strength of the garment sector, and that its success contained lessons about the important role of adhering to internationally acceptable standards in building confidence with foreign buyers and investors'.<sup>122</sup>

## 2. *Regional and subregional dynamics*

While bilateral trade relations witnessed a steady growth, China, Japan, Canada, US, the EU, and neighboring countries, Cambodia consolidated its regional position by joining ASEAN in 1999.<sup>123</sup> Membership in the regional grouping opened up new

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<sup>119</sup> Polaski, above n 65, 5.

<sup>120</sup> For a description of the ILO supervisory system, see the following website: <<http://www.ilo.org/public/english/standards/norm/enforced/index.htm>> at 30 June 2008.

<sup>121</sup> U.S. Embassy Phnom Penh, Cambodia, 'U.S.-Cambodia Bilateral Textile Agreement Quota Bonus Decision for 2004' (Press Release, 3 December 2003).

<sup>122</sup> World Bank, 'Cambodia Facing Key Choices to Build Domestic Opportunity, Manage International Challenges: World Bank President' (Press Release, 5 August 2007).

<sup>123</sup> On the pros and cons of joining ASEAN, see, eg, Keat Chhon and Aun Porn Moniroth, *Economic Development of Cambodia in the ASEAN Context: Policies and Strategies* (1998); See also Jayant Manon, *Cambodia: ASEAN Membership and macroeconomic Policy Issues. Technical assistance to Cambodia and Lao PDR to Prepare for Membership in ASEAN* (1998). See also Patrizia Tumbarello,

markets in a growing, stable, and integrated East Asian region with China at the head of the pack.<sup>124</sup> Acceptance by the grouping marked a potentially important step in the development of the country external policy and a stepping stone for further economic integration.

Cambodia's multi-track trade policy of using regionalism, sub-regionalism and bilateralism to complement multilateralism has been beneficial in generating deeper trade preferences.<sup>125</sup> Over the short term, Cambodia benefited from numerous new initiatives of the more advanced members, which aimed at assisting the integration of its less developed members such as the AISP.<sup>126</sup> At the same time, other framework agreements with ASEAN dialogue partners were also beneficial, such as the special and preferential tariff (SPT) from China, the GSP from Japan and the Republic of Korea.<sup>127</sup> The ASEAN-China Early Harvest measures provided Cambodia with an increasing number of market access opportunities free of tariffs.<sup>128</sup> Over the long term there was the prospect for an ASEAN single market and production space of more than 500 million people, with a combined GDP of over USD 600 billion. The China-ASEAN Free Trade Area (CAFTA), to be realized in 2010, will become the world's biggest trading block with a total population of 1.7 billion. The India-ASEAN Free Trade and Investment Area, if successfully, will create a potential market of 1.5 billion. Ultimately an increase in investment, production and consumption in ASEAN dialogue partners will result in increase of demand for production inputs and for

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'Are Regional Trade Agreements in Asia Stumbling or Building Blocks? Implications for the Mekong-3 Countries' (IMF Working Paper WP/07/53, 2007).

<sup>124</sup> Elena Ianchovichina, Sethaput Suthiwart-Narueput, and Ming Zhao, 'Regional Impact of China's WTO Accession' in Krumm, K and Kharas (eds), *East Asia Integrates: A Trade Policy Agenda for Shared Growth* (2003) 76.

<sup>125</sup> On the origin of Cambodia's comprehensive trade policy development, see Ministry of Commerce, *Cambodia: Integration and Competitiveness Study, A Pilot Study Prepared under the Integrated Framework for Trade-Related Technical Assistance to Least-Developed Countries* (2002).

<sup>126</sup> Under the ASEAN Integration System of Preferences (AISP), Thailand agreed to provide Cambodia a special and preferential tariff treatment for 249 products, Lao PDR 150 products and Myanmar from 300-400 products, effective in 2004.

<sup>127</sup> Japan expanded its duty and quota free treatment for LDCs to 496 agricultural and fishery products in 2003 and Cambodia is also eligible for this treatment as an LDC.

<sup>128</sup> Under the ASEAN-China Free Trade Area's Early Harvest scheme signed in July 2003, China granted to Cambodia, effective from 1 January 2004, a special preferential tariff (SPT) treatment for 297 agricultural products at zero percent tariff rates.

finished goods from ASEAN and, hopefully, Cambodia. Better market access to ASEAN dialogue partners' markets will help Cambodia's economy to grow.<sup>129</sup>

Other subregional socio-economic development initiatives worth noting are: (1) the Greater Mekong Sub-region; (2) the Thai-Cambodia joint development within the framework of Ayeyawady Chao Phraya Mekong Economic Cooperation (ACMECS); (3) the Cambodia-Laos-Thailand Emerald Triangle; (4) the Vietnam – Laos – Cambodia Development Triangle; and (5) the Bagan Economic Cooperation Strategy.<sup>130</sup>

### 3. *Integration in the multilateral trading system*

Cambodia succeeded to join the WTO on 11 September 2003 at the Fifth WTO Ministerial Conference at Cancun, Mexico - as the first two LDCs along with Nepal.<sup>131</sup> Joining WTO has marked the final step in bringing Cambodia back into the major regional and international organizations that govern international economic relations. Membership in the WTO was an overarching national objective to secure application of non-discriminatory conditions for access of Cambodian goods, particularly garments and textiles products, and services to foreign markets, and to promote development and diversification of export opportunities. A sufficient degree of protection of domestic producers within the framework of an open economy and on the basis of norms and rules of the WTO would be also ensured.

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<sup>129</sup> The Japan-ASEAN Comprehensive Economic Partnership signed in 2003 provided Cambodia a broad-based liberalization of trade and investment promotion. The Japan-ASEAN Comprehensive Economic Partnership focused on regional trade and investment promotion with other facilitation measures, including, customs procedures, standards and conformance, financial services, information and communications technology, science and technology, human resource development, small and medium enterprises, tourism, transport, energy and food security.

<sup>130</sup> The Summit for Economic Cooperation Strategy between Cambodia, Lao PDR, Myanmar and Thailand, held on November, 2003 in Bagan—Myanmar, led to the adoption of the Bagan Declaration for Economic Cooperation Strategy among the four countries. The strategy has a 10-year timeframe from 2003-2012 with focused areas on trade and investment facilitation, agricultural and industrial cooperation, transport linkages, tourism cooperation and human resources development.

<sup>131</sup> For a thorough analysis of the implications of Cambodia's accession to the WTO, see Siphana Sok, *Lessons from Cambodia's Entry to the World Trade Organization* (2005).



## C. *Investment regime, privatization measures and private sector development*

### 1. *Investment policy*

FDI was kick started in the early 1990s, with the construction of hotels needed by the arrival of the UNTAC peace keeping troops. The initial surge in FDI concentrated on tourism and construction sectors. Cambodia's cultural heritage, notably the country's ancient monuments, were perceived by investors as having a strong potential to attract large numbers of foreign tourists, especially with the advent of political stability. The ensuing construction of hotels and basic infrastructures that were destroyed by the civil war attracted large investment into the construction sector.<sup>132</sup> After the formation of the Government investment are marked by four distinct periods.<sup>133</sup>

(a) *Period 1994-1995:* After the UNTAC withdrawal in late 1993, Cambodia attracted a significant amount of FDI with the enactment of a liberal investment law in 1994. FDI grew from almost nothing in the late 1980s to an annual average of \$61 million and \$217 million in the first half and the second half of the 1990s, respectively. The second wave of investments concentrated on logging. The relatively abundant hardwood combined with the minimal formalities to log attracted investment into the logging industry. However, due to strong complaints from the donor community concerning the rapid and chaotic depletion of forestry resources, the government finally embarked on a major effort to reform forestry policy in 1999.

(b) *Period 1996 – 1998:* The next wave of investment was in the garment industry. The signing of the bilateral trade agreements with the United States and the European Union substantially reduced the effective tariff rate imposed on Cambodian garment exports to these markets. This privileged market access in turn attracted

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<sup>132</sup> See World Bank, *Cambodia: From Rehabilitation to Reconstruction*, above n 57; World Bank, *Cambodia: Rehabilitation Program: Implementation and Outlook*, above n 58.

<sup>133</sup> For a general overview of legal texts and its interpretations, see Council for the Development of Cambodia (CDC), *Guide to Investing in Cambodia* (1999), (2001), (2002), (2003); Siphana Sok, *Legal Aspects of Doing Business in Cambodia* (2001); United Nations Conference on Trade and Development/International Chamber of Commerce, *An Investment Guide to Cambodia: Opportunities and Conditions* (2003); DFDL/Mekong Law Group, *Cambodia Legal and Investment Guide* (2002), (2006); American Embassy, *Cambodia Investment Climate* (2000), (2002). For statistical analysis, see Hing Thoraxy, *The Development of Cambodian Investment Policy and Practices* (2000), (2002), (2003). For practical business guides, see Ministry of Commerce, *Cambodia Business and Investment Handbook* (1998), (2000).

substantial foreign investment in the garment manufacturing sector from Asian countries, primarily Malaysia, Taiwan, China, South Korea and Singapore. Japanese investors are notably absent from Cambodia.<sup>134</sup> FDI went mainly into tourism and manufacturing, with infrastructure and construction coming a somewhat distant third.

The year 1997 appears in retrospect to have been a turning point, to the extent that FDI declined progressively for the next several years. Both official and private sector transfers and investments showed the loss of confidence in Cambodia in 1997. Domestic political strife and the Asian financial crisis both occurring in mid-1997 had a dramatic impact on investment with the exception of the garment industry, which remained dynamic as witnessed by a significant number of new factories built in 1998.<sup>135</sup>

(c) *Period 1998-2004:* For the next 7 years, the number of projects approved continued to diminish dramatically, a decline that occurred against a backdrop of restored macroeconomic and political stability, both of which are key preconditions for attracting foreign investors. Except for the three sectors identified above that provided some surges at different stages in the past, the decline of foreign investment in Cambodia is likely due to three factors. First, most of the foreign investors came from Asian countries that were severely hit by the 1997 financial crisis. Second, the prospects for a better investment environment in Cambodia remained weak, as key reforms to improve governance have progressed slowly. Business people often cited corruption and lack of transparency as the main constraints to investment in the country.<sup>136</sup> Last, competition from countries in the region like China and Vietnam

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<sup>134</sup> Asian Development Bank, *Phase I Report, Cambodia's Garment Industry*, above n 112.

<sup>135</sup> The global apparel trading system has been governed for over forty years by a system of quotas that set limits on the textile and apparel products from anyone country that can be sold in large, affluent markets like those of the US and the EU. Despite that risk, willing investors from China, South Korea, Taiwan, and other East Asian economies bought, leased, or built apparel factories in Cambodia. Buyers from the US and EU also arrived, in part to circumvent the limits they faced on their imports from other countries under the global quota system. See Polaski, above n 65 and Abrami, above n 65.

<sup>136</sup> World Bank, *Cambodia Governance and Corruption Diagnostic: Evidence from Citizen, Enterprise and Public Official Surveys* (2000).

became fiercer.<sup>137</sup> Policy merging between the trade regime and foreign direct investment regime was developed to bring better coherence and efficiency.<sup>138</sup>

(d) *Period 2005 – present:* The period is marked by the discovery of oil and gas and the massive investment from China. In the last few years, FDI from China increased substantially going unfortunately into controversial natural resources exploitation projects and larger scale hydro power generation.<sup>139</sup> State-linked mainland Chinese companies bought into the country's utilities and industries, and new trade deals offered China unprecedented access to Cambodia resources and markets. Chinese state-owned and private companies plowed more than \$450 million into Cambodia in 2005 — a 460% increase over 2004. In 2006, China became the dominant foreign investor with \$763 million in investment approvals, followed by Russia a distant second with approvals totaling \$278 million, Thailand and Taipei, China.<sup>140</sup> China's aggressive investment inflow has enabled Cambodia to claim success in attracting twice the amount of FDI per capita than the LDCs average.

## 2. *The "Open Skies" Tourism Policy*

For a small country recovering from recent civil conflict, the provision of tourism services represents a significant and rapidly growing segment of cross-border trade flows. The tourism industry is the second biggest contributor to the Cambodian economy accounting for nearly 10% of GDP. The tourism industry has expanded significantly since 1993, with annual average growth of 20%. Growth was particularly strong since 1999 due to improved political stability and security, better infrastructure and quality facilities, and the re-introduction of 'open skies' policy that allowed international airlines to fly directly into Siem Reap. The 400 square kilometer complex of Khmer temples dating from the 9th to the 15th century, recognized as a

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<sup>137</sup> EIC, above n 62, 35.

<sup>138</sup> Ministry of Commerce, *Cambodia: Implementing the Integrated Framework* (2002).

<sup>139</sup> See Don Lee, 'The China Effect: Cambodia Greets a Cash Invasion', *Los Angeles Times* (Los Angeles) September 2006; Sam Rith, 'Chinese Company To Build Hydroelectric Dam in Cambodian Kampot Province', *Phnom Penh Post* (Phnom Penh) 06 April 2006; 'Chinese Company To Finish \$28-Million Bridge Building in Cambodia in 50 Months', *Agence Khmer de Press (AKP)* (Phnom Penh) 12 June 2007.

<sup>140</sup> 'Chinese investment pouring into Thailand's neighbours', *Deutsche Presse-Agentur* (Phnom Penh) 4 December 2007.

World Heritage site by UNESCO, gave Cambodia its reputation and prestige as a tourist destination worldwide. The number of tourist arrivals increased dramatically from 250,000 to over 2 million between 1999 and 2007, despite the Iraq war and the SARS and Avian Flu.<sup>141</sup> The Siem Reap area alone, where the Angkor Wat archaeological complex is located, received about more than half of all foreign tourists.

The 'open skies' policy was first introduced in the late 1960s, and saw the opening of the international airport at Siem Reap in 1968. Flights were ended, however, during the 1970s. In late 1997, in response to the drastic fall in tourist arrivals and the slump in the tourism industry, the Government re-introduced gradually the "open skies" policy as a strategy to attract tourists visiting other neighbouring Asian countries. By the end of 2007, over a dozen of international airlines had commercial and charter flights into Siem Reap. The Civil Aviation Law was passed in response to the need to regulate the increasing growth of low-cost Asian airlines such as JetStar and AirAsia.<sup>142</sup>

Overall, within Cambodian laws and public and private institutions, significant improvements have been made in the facilitation of the provision of tourism services. The Cambodian government has greatly reduced travel restrictions, streamlined visa application processes, and upgraded its e-visa automation. The rise of the tourism industry has stimulated further improvements in a broad range of support services, including banking facilities and the provision of ATM services. Another policy was the opening of new border entry points and the improvements in road transport and access by sea which resulted in an increase in tourists from neighbouring countries as well as a surge in domestic tourism. Cambodia's tourism industry still holds much potential for further growth. Beside its archaeological resources, good potential exists to develop eco-tourism through the preservation of natural resources, including national parks, wild life sanctuaries, the Tonle Sap biodiversity rich wetland eco-

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<sup>141</sup> Ministry of Tourism, *Tourism Statistical Report* (2006).

<sup>142</sup> The latest comer is China Southern Airlines, the country's biggest airline, which opened direct flights from Guangzhou, capital of southern Guangdong Province, to Siem Reap in Cambodia. The company also runs direct flights from Guangzhou to Phnom Penh, the Cambodian capital. See also 'First direct flight from Europe touches down', *Development Weekly* (Phnom Penh) 17 – 23 December 2007.

system and the coastal eco-systems.<sup>143</sup> Investment in the sector reached a record high of USD 2.5 billion in 2007, partially due to the government leasing of several islands off the coast of Sihanoukville and Kampot provinces for tourism development.<sup>144</sup>

## V. CONCLUSION

Overall much progress has been achieved in recent years. Cambodia enjoys its mandate from new acceptance into the international community through its WTO accession. The rapid growth and current relative stability of garment exports suggests that this membership has provided meaningful opportunities. The relative stability in prices and exchange rates has also helped to create a fairly good macro-economic environment, leading to strong GDP growth. The level of ODA (Official Development Assistance) is extremely high in relative and even absolute amounts and reflects international acceptance of the current government.

Important progress in ensuring peace and security, rebuilding institutions, and establishing a stable macroeconomic environment has led to a steady growth over the past ten years.<sup>145</sup> The last three years have seen double-digit growth underpinned by an expansion of agricultural production and continued robust activity in tourism, garment exports, and construction. Services, particularly in the financial and telecommunications sectors, are also increasingly contributing to growth. In addition, the existence of Angkor Wat has allowed the development of a major tourist attraction with a total annual influx approaching 2 million tourists. In terms of its position in the sub-region, there is no doubt that Cambodia is in a pretty good geographic neighborhood marked by an absence of economic crisis and signs of growth in all major markets. Many ASEAN members are richer, fairly fast growing and seek more aggressive integration. China is nearby and rapidly imports commodities that Cambodia produces.

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<sup>143</sup> Sheridan Prasso, 'Cambodia's Coast of Utopia', *New York Times* (New York) 18 November 2007.

<sup>144</sup> *Development Weekly* (Phnom Penh) 10 – 16 December 2007.

<sup>145</sup> Anwarul Chowdhury, UN under secretary-general and high representative of Least Developed Countries (LDCs) declared that he was optimistic that Cambodia could leave the ranks of the poorest countries by 2020. *Development Weekly* (Phnom Penh) 20 - 26 March 2006.

**CHAPTER III:**

**CAMBODIA’S EXPERIENCES ON LAW AND  
ECONOMIC DEVELOPMENT**

## **Chapter III:**

### **Cambodia's experiences of law and economic development**

#### **I. POLICY PERIODS AND LEGAL CHANGE IN CAMBODIA**

##### **A. *Policy Periods***

As highlighted in the previous chapter, Cambodia has experienced over the past 50 years frequent, and unusually drastic, changes in its political and economic regimes since its independence in 1953. Different types of legal models were established under different regimes.

The evolution of the Cambodian legal system closely tracks the policy periods and the changes appear to have supported the prevailing economic strategy. Laws are used or enacted to support economic policies, the effect of which is to change economic performance for better or worse. The performance leads to a demand for new laws. The causal links were not restricted to the interaction between law, economic development and economic policy. The strength and direction of that interaction is determined by another variable — politics. Since 1954 to the present, while economic policies became the driver for changes in the legal system, it was politics which have undermined its implementation.

The Cambodian legal system has evolved over time through a series of contributions from various legal sources, beginning in the early days with customary rules of Asian origins, followed by the French transplanted laws introduced during the period of the French protectorate, the socialist-influenced civil law traditions in the 1980s, the international laws of the United Nations Transitional Authority of Cambodia (UNTAC) in the early 1990s, and finally the contemporary laws of the new constitutionally-elected Kingdom of Cambodia.

Many unique factors make review of the Cambodian laws and legal institutions difficult. In contemporary history, the current shape and structure of the Cambodian legal system is largely the outcome and by-products of recent historical distortions.

Seven distinct eras and their respective impact on the Cambodia's current legal system are highlighted as follow:

- 1880s - 1953: Post-Independence period and the French colonial rule.
- 1953 -1970: Post-Independence period and the French tradition.
- 1970-1975: The Khmer Republic and the civil war.
- 1975-1979: The Democratic Kampuchea and the Genocidal era.
- 1979-1991: The People's Republic of Kampuchea / The State of Cambodia and the reconstruction period.
- 1991-1993: The UNTAC Transitional period.
- 1993-Present: The post peace process and the transition to a democratic and market economy.

### **1. *1880s to 1953: Pre-Independence Period and the French Colonial Rule***

Ruled as a French protectorate until 1953, Cambodia developed a legal and judicial system based almost entirely on that of France. The influence of France extended not only to the laws imposed on the protectorate prior to independence but also to the legal educational system offered the Cambodian elite. The development of Cambodian lawyers, prosecutors, bureaucrats and, of course, judges, who were familiar with this system assured that, after independence, the legal system and judiciary remained firmly steeped in the French tradition. This tradition was, however, almost completely wiped out by the Khmer Rouge regime.<sup>146</sup>

Before the establishment of the French protectorate, social rapports in the countryside are exclusively governed by customary rules. These rules have progressively been developed by the Cambodians, generally on a consensus basis and at the local level, through their traditional norms. These customary rules are unwritten in nature and are the product of history, culture and beliefs of the Cambodians. They then tended to respond, in a given environment, to particular needs and specific constraints. At that time, it concerned primarily a self-subsistence agrarian economy, organized around

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<sup>146</sup> The 'Treaty of Friendship, Commerce and French Protection of 11 August 1863' was amended by the Treaty of 17 June 1864 and was subsequently ratified by the French Emperor Napoleon III. See in particular Tully, above n 47, 17.



the village or *phum* institution. There, reinforced by the religious authority symbolized by the *wat*, the village chief played a central role, notably in the resolution of conflicts.<sup>147</sup> The first writing of the so-called '*Codes cambodgiens*' was initiated around 1620 by King Chey Chetha in response to what he noticed as the excessive number of abuses and injustice.<sup>148</sup>

Under the Treaty of 1863 which established Cambodia as a protectorate of France, Cambodia was to maintain that relation for almost a century with France in charge of international relations, and Cambodia enjoying only internal autonomy.<sup>149</sup> The Convention of 1884 conferred full powers on the French protectorate to undertake judicial and administrative reforms.<sup>150</sup> The new era was marked by a series of humane reforms beginning with the abolishment of corporal punishment and a more humane method of capital punishment. Social measures were taken to eradicate slavery gradually pursuant to a Decree of 1 February 1898 which completely abolished slavery. In 1877 the French protectorate authorities attempted to establish a modern judicial body to replace traditional Cambodian dispute resolution system. In 1887 Cambodia was integrated into the Union Indochinoise, a step that marked the beginning of a more centralized approach and the initiation of a reformed native bureaucracy.<sup>151</sup> A new ordinance was passed stipulating that officials with judicial functions had to pass special examinations. In 1906, judges and all members of tribunals were required to swear an oath before a statue of the Buddha.

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<sup>147</sup> For a detailed account of the customs see Paul Collard, *Cambodia and Cambodians: The Metamorphosis of the Khmer Kingdom by the French Protectorate Method* (2001) [trans of: *Cambodge et Cambodiens: Metamorphose du royaume khmer par une methode francaise de protectorat*].

<sup>148</sup> Twenty four codes were completed in 1624 before his death. Subsequent kings, namely Kings *Chey Chetha II*, *Ang Saur Chey Chesda*, and *Ang Duong* continued this legacy. By 1881, fifty codes were completed thirty of which were published under the reign of King Norodom. The codes was first translated into French by a priest named Cordier and completed by the work of Adhemard Leclerc. See LeClere Ademar, *Cambodian Codes* (1898) 2 volumes. [trans of: *Les Codes Cambodgiens*]. See also Chaing Sinath et al, 'Introduction to Cambodian Law' (2003) 21-22. [trans of: *Introduction au droit cambodgien*].

<sup>149</sup> Ibid 109-116.

<sup>150</sup> The first article of the Treaty provided in effect that the king of Cambodia accepts all the administrative, judicial, financial and commercial reforms which the government of the French Republic judges in future to be useful to facilitate the execution of the tasks of the protectorate.

<sup>151</sup> Tully, above n 47, 103. Long before the first wave of legal reforms, King Sisowath signed a convention for a restricted civil servant list.

The formal “modern” legislation, originated from France and more or less customized to local conditions, was introduced over the years beginning with the set up of a special commission on penal reform in 1910. The commission made recommendations for sweeping changes to the penal code beginning with the promulgation of Cambodia's first Criminal Code<sup>152</sup> and Code of Criminal Procedure in 1911<sup>153</sup> followed by the Code on the Organization of the Judiciary.<sup>154</sup> The entry into force of these codes on 1 July 1912 marked the official induction of the Cambodian legal system into the Romano-Germanic legal system.<sup>155</sup> The Cambodian Civil Code, the Code of Civil Procedure was passed on 1 July 1920.<sup>156</sup> In 1905, the crown land system and the system of *apanages*, or ‘fiefs’ was abolished. A new decree of 1907 gave free title to landholders, with a system of tribunals to resolve disputes.<sup>157</sup> In 1922 a judicial reform brought about the separation of judicial power from that of provincial governors. The year 1932 marked the formal introduction of the legal profession in Cambodia.<sup>158</sup> In 1936 Cambodia enacted 3 laws to regulate different categories of people involved in the labour field and to complement employers and employees relations initiated under the 1920 Civil Code. These 3 laws have significantly marked a turning point in the historical evolution of the Cambodian Labour Law. Over the next two decades, these codes were revised and in 1937 a new Code of Civil Procedure was promulgated.<sup>159</sup>

On 6 May 1947 the first Cambodian Constitution was promulgated establishing a constitutional monarchy.<sup>160</sup> Under the 1947 Constitution, Cambodia was governed by

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<sup>152</sup> The Criminal code of 20 November 1911 was replaced by a new code of 25 August 1924. The latter was amended twice and replaced by the code of 16 May 1929 and then by the code of 23 July 1934. Chaing, above n 148, 23.

<sup>153</sup> Tully, above n 47, 142.

<sup>154</sup> Chaing, above n 148, 24.

<sup>155</sup> Ibid.

<sup>156</sup> Ibid. For a detailed account of the institutional, socio and economic development during the period see Collard, above n 47, 245.

<sup>157</sup> Tully, above n 47, 142.

<sup>158</sup> Royal Declaration No. 32 of 15 March 1932, later amended by Royal Kram No. 648 dated 30 March 1951.

<sup>159</sup> LeClere Ademar, above n 148.

<sup>160</sup> Tully, above n 47, 420. Stretching to 107 articles, the Constitution laid down the framework for Cambodia as a constitutional monarchy within the French Union, with Khmer as the official language and Buddhism as the official religion. Power emanated from the monarchy but that power was circumscribed by the constitution. The rule of law was to be respected, along with *habeas corpus*. Accused person were held not to be guilty until proven so. Torture and ill treatment were forbidden.

a monarchy with two parliaments - the National Assembly and the Popular Assembly. The members of these parliaments were elected by general elections. National Assembly members served four-year terms, and the Popular Assembly members two-year terms. The Constitution stipulated that all powers emanate from the King. The Executive, the Legislature, and the judiciary acted in the name of the King.<sup>161</sup>

The same year saw the promulgation of Law on the Functioning of Supreme Council of Magistracy. In 1948 an Administrative Tribunal was created followed by the High Court of Justice in 1949, with jurisdiction over crimes committed by members of the Government in their official duties. In 1950 the Code of Military Justice and the Commercial Code were promulgated.<sup>162</sup> Patterned after the civil law courts of France, these codes touched all sectors of the political, economic and social life. However, its real impact on the rural was minimal as the farming collectivities remained largely subject to local customs. The modern legislation was applied mostly to the exploitation of natural resources, state activities or private enterprises.

## **2. 1953 -1970: Post-Independence Period and the French Tradition**

On 9 November 1953, Cambodia obtained its full independence from France after ninety years of French protection.<sup>163</sup> The following period marked an impressive development of the legal thinking of Cambodia.<sup>164</sup> In 1955, the 1947 Constitution was amended paving the way for King Norodom Sihanouk to abdicate and become Head of State. From 1953 onward, significant events have marked this era such as the transfer of the administration of the Cambodian courts from the French Administration to the Cambodian Government on August 29, 1953. The period saw

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Article 9 guaranteed freedom of speech and publication and rights of association were enshrined in Article 10.

<sup>161</sup> Tully describes that:

Voters went to the polls in December 1947 to elect the country's first National Assembly. The fragile Cambodian democracy was out of the chrysalis stage..... Cambodia's first elected assembly had ratified a relatively free constitution.....In retrospect, this was the high water of the first post-war democratic experiment.

Tully, above n 47, 421.

<sup>162</sup> Marcel Clairon, *Commercial Code* (revised edition ed. 1961) [trans of: *Code de Commerce*].

<sup>163</sup> Ibid 480.

<sup>164</sup> In fact for the next 20 years a huge number of legal thesis were prepared and defended by Cambodian jurists. See Chaing, above n 148, 24.

the promulgation of a series of welfare laws, including a Labor Code. The 1957 Constitution guaranteed Cambodian citizens a number of basic rights such as freedom of belief, the freedoms of speech, writing, printing, broadcasting, meeting and assembly, and freedom in elections, including the right to stand for election to the parliaments. In 1969, Cambodia joined ILO and ratified several ILO conventions.<sup>165</sup>

The 1960's period witnessed a radical reform of the country's financial institutions when foreign banks were closed and domestic private institutions liquidated in 1963-64.<sup>166</sup> By 1969 the nationalized financial sector was completed and totally restructured. Very little industrial credit was available from the undercapitalized national investment fund, and private enterprises could not turn to the commercial banks because of their lack of deposits and the central bank's very restrictive discount policy resulting in significant constraint on both agricultural development and private investment in manufacturing, tourism and potential sources of growth.

In the area of international trade, Cambodia enjoyed a special status within the General Agreement on Tariffs and Trade (GATT), due to its former relationship with France, and also came very close to acceding on its own. The country's previous colonial status could have facilitated Cambodia's accession to GATT. Under the terms of Article XXVI:5(c) of GATT 1947, countries such as Cambodia were permitted a relatively easy route for entry into GATT. Cambodia did indeed enjoy *de facto* status as a GATT contracting party, as did other former colonies of France. While some former colonies rejected both this status and the prospects for GATT contracting party status, Cambodia made a very serious effort to accede to GATT on its own, following the more difficult approach of negotiating under GATT Article XXXIII. The country took this approach in order to avoid adopting the tariff commitments that France had already made in GATT negotiations. The country went so far as to finalize negotiations with the existing contracting parties over the terms of its protocol of accession, which were formally concluded on April 6, 1962. Although the Geneva side of the process was concluded, Phnom Penh never completed the

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<sup>165</sup> The Night Work (Women) Convention, 1919 (No. 4), The Night Work of Young Persons (Industry) Convention, 1919 (No. 6), the White Lead (Painting) Convention, 1921 (No. 13), and The Forced Labor Convention, 1930 (No. 29).

<sup>166</sup> Russell R. Ross, *Cambodia: a Country Study* (1990) 29, 146-149.

domestic ratification procedures. One might speculate that accession was rejected in part because of domestic political turmoil, and in part as a reflection of the country's efforts to assert its political neutrality.<sup>167</sup>

### **3. 1970-1975: *The Khmer Republic and the Civil War***

On 22 March 1970 the entire National Assembly, led by Premier General Lon Nol, voted to bar the return of Prince Norodom Sihanouk to the country, thus marking the end of Cambodia's post independence era.<sup>168</sup> The Lon Nol Government that succeeded the fall of Sihanouk quickly abolished the monarch and proclaimed itself the Khmer Republic. War followed between the Lon Nol government and resistance forces loyal to Prince Sihanouk and the communist Khmer Rouge. In 1972 a new Constitution proclaimed Cambodia as a "Khmer Republic" and introduced a new multiparty political system and democratic principles. The president held all executive power and commanded the national armed forces. The president also promulgated the laws passed by the National Assembly. The parliament included a National Assembly and a Senate with members elected by general elections. The courts were independent and monitored by a supreme court. The Supreme Council of Courts guaranteed the independence of the Judiciary, and held the power to discipline magistrates.

The 1970s saw several major events in the field of labor law when the Khmer Republic amended the Labour Law, overhauled the labour administration, and ratified its membership to the International Labour Organisation (ILO) and various ILO core conventions.

### **4. 1975-1979: *The Democratic Kampuchea: The Genocidal Regime***

On April 17, 1975 radical Khmer Rouge forces overthrew the Lon Nol government and established Democratic Kampuchea (DK), under the leadership of Pol Pot.<sup>169</sup>

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<sup>167</sup> Craig VanGrasstek, *Laws and Policies of the United States of America Concerning the Accession of Cambodia to the World Trade Organization* (2000) 5-6.

<sup>168</sup> Ross, above n 166, xxx (roman numerals), 43.

<sup>169</sup> *Khmer Rouge* (Red Khmer) - The name given to the Cambodian communists by Sihanouk in the 1960s. Later (although a misnomer) it was applied to the insurgents of varying ideological backgrounds who opposed the Khmer Republic regime of Lon Nol. Between 1975 and 1978 it

Within days of assuming power, the Khmer Rouges evacuated all cities, forcing virtually the entire Cambodian population into the countryside to live and work on a communal basis. On 5 January 1976 the Khmer Rouges adopted their Constitution.<sup>170</sup> The regime implemented a Maoist communist system promoting ultra-collectivism under which the three branches of government-the Executive, the Legislature, and the Judiciary-were unified under a single institution called the *Angkar*. The Pol Pot regime not only abolished Cambodia's market and democratic mechanisms but completely eradicated all existing laws, ancient and modern.

The DK Constitution did not recognize any natural right and, among them, right to ownership. All individual ownership over movable or immovable property was forbidden. The human costs of the regime, which included the murder of almost all persons with legal training, had a profound impact on the long-term evolution of Cambodia's legal system. Legislators, prosecutors, defenders, judges, lawyers and law professors were killed or forced to flee the country. Of the four to five hundred lawyers and law professionals in Cambodia during the period prior to 1975, more than eighty percent were killed or died of starvation and disease. Law books were destroyed and buildings that housed courts and the law school were converted to other uses. By the time the Vietnamese backed regime was proclaimed on 10 January 1979, only a handful of lawyers, including five judges, were known to remain in the country. None resumed practice either as judges or lawyers.

In human capacity and professional development terms, the legal and judicial profession had been annihilated; it was truly ground-zero for the justice system of Cambodia. Lacking the trained judges, lawyers, prosecutors, defenders, court clerks,

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denoted the Democratic Kampuchea regime led by the radical Pol Pot faction of the Kampuchean (or Khmer) Communist Party. See Ross, above n 166, 316.

<sup>170</sup> Ross quoted:

Khieu Samphan [President of the DK State Presidium] described the 1976 Constitution as "not the result of any research on foreign documents, nor . . . the fruit of any research by scholars. In fact the people-workers, peasants, and Revolutionary Army - wrote the Constitution with their own hands." It was a brief document of sixteen chapters and twenty one articles that defined the character of the state; the goals of economic, social and cultural policies; and the basic tenets of foreign policy. The "rights and duties of the individual" were briefly defined in Article 12. They included none of what are commonly regarded as guarantees of political human rights except the statement that "men and women are equal in every respect." The document declared, however, that "all workers" and "all peasants" were "masters" of their factories and fields. An assertion that "there is absolutely no unemployment in Democratic Kampuchea" rings true in light of the regime's massive use of forced labor.

Ross, above n 166, 60.

and other personnel necessary to make a court system function, Cambodia's judiciary has been and continues to be crippled even until the present day.<sup>171</sup>

## **5. 1979-1991: The People's Republic of Kampuchea / The State of Cambodia and the Reconstruction Period**

After the ouster of the Pol Pot regime on 7 January 1979, a new government was established, the People's Republic of Kampuchea (PRK), led by Mr. Heng Samrin as head of state and president of the parliament. The Heng Samrin regime was effectively controlled by the communist party, called the People's Revolutionary Party of Cambodia (PRP) which later became the Cambodian People's Party (CPP). On 27 June 1981 the PRK adopted a new Constitution, establishing a socialist economy, one-party system and promoting close international relations with other socialist countries.<sup>172</sup>

Despite the devastation committed by the Khmer Rouge, a legal system began to re-emerge in 1979, this time under the influence of the Communist/Socialist tradition. The legal system has functioned largely immune from either domestic or international scrutiny. By law and in practice, the system functions to guard the interests of the state and the party at the expense of individual rights. Based on statutory laws, and influenced by Khmer customs and by Marxist ideology, the legal system was initially elaborated by the 'People's Revolutionary Council' (PRC), which exercised legislative and executive powers between 1979 and 1981. During that period, the PRC issued numerous decrees covering the most urgent matters. For example, it adopted an electoral law, established the Tribunal of Phnom Penh, issued a decree defining several crimes (such as crimes against the security of the state, theft, robbery,

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<sup>171</sup> As preparations to try former Khmer Rouge leaders move forward, legal experts are concerned the dubious records of some Cambodian judges will cast doubt on the credibility of the country's war crimes tribunal. See Ker Munthit, 'Cambodia judges' credibility questioned' *The Associated Press* (Phnom Penh) 22 May 2006.

<sup>172</sup> The Constitution of the PRK defines Cambodia as "a democratic state.... gradually advancing toward socialism." The transition to socialism was to take place under the leadership of the Kampuchean (or Khmer) People's Revolutionary Party, a Marxist-Leninist party founded in June 1951. The Constitution explicitly defines the country's position in international relations. It places Cambodia within the Soviet Union's orbit. The country's primary enemies, according to the Constitution, are "the Chinese expansionists and hegemonists in Beijing, acting in collusion with United States imperialism and other powers." Ross, above n 166, 209.

corruption, abuse of power, embezzlement, murder and rape) and set up the administrative organs of the government.<sup>173</sup>

In criminal matters, decree No. 2 of 1980 constitutes the only comprehensive legal document establishing criminal offences. Its purpose was to give urgent regulation to the most serious political and common-law crimes, but it is not comprehensive enough to constitute a proper criminal code and has left wide gaps in the system.<sup>174</sup> Subsequently, decree-law No. 4 of 1982 established several military crimes, and other laws further defined additional crimes in specific fields such as taxation and custom. Decree-law No. 9 of 12 March 1986 provides basic rules on the procedures to be followed for arrest, detention, indictment and search of person or domicile. Lawyers per se did not exist. Rather, following the Vietnamese model, administrative cadres representing the state (and hence, the interests of the people) appeared as proxies for the accused. Defendants were summarily found guilty and sentenced to corresponding periods of incarceration or punishment.

The Tribunal of Phnom Penh started functioning in 1980 on the basis of a decree issued by the People's Revolutionary Council, and was mainly meant as a special body for trying members of the Pol Pot regime.<sup>175</sup> Only in 1982 did a comprehensive law establish the provincial tribunals, the prosecutor's offices and local conciliation bodies, which all started functioning between 1983 and 1984 in the various provinces.<sup>176</sup> Decree-law No. 5 of 1982 established and regulated the functioning of the Military Tribunal. In 1985, a law established the Supreme Court and the Office of the Prosecutor-General.<sup>177</sup> In 1987, a decree-law on the organization and functioning of the Supreme Court and the Office of the Prosecutor-General was adopted by the Council of State, allowing those two organs to assume their functions during that year.

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<sup>173</sup> Hedi Annabi et al, *Report of the United Nations Fact-Finding Mission on Present Structures and Practices of Administration in Cambodia*, 24 April - 9 May 1990', United Nations (1990) 113. See also a list of laws and regulations adopted during the period in Annex 3.1.

<sup>174</sup> *Decree-law concerning condemnation for treason committed against the revolution and other illegal behaviour 1980.*

<sup>175</sup> *Decree-law concerning the decision to establish the People's Revolutionary Tribunals in all provinces and municipalities 1980.*

<sup>176</sup> *Law on the Organization of the Court and Prosecution Department 1982.*

<sup>177</sup> *Law on the Organization of the People's Supreme Court and the General Prosecution attached to the People's Supreme Court 1985.*



With the 1987 reform, import regulations were changed, trade was opened up with all countries, and the private sector played a more important role in the economy. The Law on Contracts and Other Liabilities of 28 October 1988 can be traced back to the early reform period when the regime began its first reform toward a free market economy. Inspired by the French Civil Code, it is fairly comprehensive and has surprising market orientation. It still remains the primary source of Cambodian contract law up to today.

Following a successful two year process of reconciliation and the final withdrawal of Vietnamese troops from Cambodia, the Constitution was amended on 30 April 1989 to reunite Cambodia. The PRK was renamed as the State of Cambodia.<sup>178</sup> The constitutional amendment marked the beginning of a period of decollectivisation and the progressive transition to the market economy.<sup>179</sup> Since, a limited form of private property ownership was reintroduced, the establishment and operation of private enterprises was allowed and the country began opening up to international trade.

Up to 1989, citizens were provided with the right to hold property but ownership remained with the State. Changes in land policies allowed first rural households and increasingly urban households to acquire land use rights, although the distribution of land use rights and their transfer was still closely monitored by the state. The land rights were available only to Khmer citizens who had used and cultivated their land continuously for at least one year before the promulgation of the market oriented policies. The reform recognized ownership rights to residential land-plots not bigger than 2 000 square meters, possession rights for cultivated land-plots of less than 5 hectares, and concession rights for plantation landplots larger than 5 hectares. The ownership rights from the earlier regimes were not recognized in the land allocation

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<sup>178</sup> The new Constitution changed the name of the country from "People's Republic of Kampuchea" to "State of Cambodia", changed the emblem and the flag and provided for the change of the national anthem. Article 1 describes Cambodia as "... an independent State, sovereign in its territorial integrity, peaceful, democratic, neutral and non-aligned."

<sup>179</sup> The 1989 Constitutional amendments seem to lead Cambodia away from the socialist model on which the 1981 Constitution was built. Among the most significant changes is the introduction of Buddhism as the religion of state (article 6), the recognition and guarantee of private property rights (articles 12 to 18), an expansion of individual rights of citizens (Article 35) and a re-distribution of powers between the various Constitutional organs of the State. See Hedi Annabi et al, above n 173, 107.

process: instead, the redistribution was based on a formula including household size and other household characteristics.<sup>180</sup>

The 1989 Constitution recognized private ownership - in fact, only right of possession was recognized as a first step toward recognition of private ownership - and stimulated reform measures and the enactment of important economic laws such as the Law on the Import and Export of 20 July 1989 and the Law on Import and Export Duties and numerous banking regulations.<sup>181</sup> The decree of 26 July 1989 regulated a duty drawback on import scheme for goods bound for re-export. Given the country's reorientation toward external trade and capital mobilization, it is not surprising that one of the first laws that was enacted was the Law on Foreign Investment of 20 July 1989. Since, the establishment and operation of private enterprises was allowed and the country began opening up to international trade.

Generally, the biggest gaps in the legal system during the period pertain to the lack of proper civil, penal and commercial codes, of a comprehensive law on the regime of private property, of laws on citizenship, naturalization and residency, and of a code on civil procedure. The lack of a well-trained cadre of lawyers remains a major constraint for the development of the legal system and for achieving a greater degree of efficiency and reliability in the functioning of the judicial organs. The process of codification of laws has been slow and many lacunae in the system still exist.

## **6. 1991-1993: the UNTAC Transitional Period**

The United Nations-sponsored "Agreement on a Comprehensive Political Settlement of the Cambodia Conflict" (the Peace Agreement) was signed by Cambodia's warring factions and a 18 countries in Paris on October 23, 1991, formally ending 13 years of conflict.<sup>182</sup> The Supreme National Council (SNC) acting in accordance with the

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<sup>180</sup> The reason was that there were no documents left to prove formal land ownership from the colonial period, at the same time as claims based on historical or traditional land ownership rights were considered too vague or imprecise. One consequence was that the nominal distribution of land after the reforms in 1989 was remarkably egalitarian.

<sup>181</sup> See Annex 3.2 for a complete list of banking laws and regulations of the State of Cambodia.

<sup>182</sup> The Peace Accords, commonly referred to as the Paris Peace Accords, contained three documents, namely: (i) the Agreement on a Comprehensive Political Settlement of the Cambodia Conflict; (ii) the Agreement concerning the Sovereignty, Independence, Territorial Integrity and Inviolability,

powers granted to it as the unique legitimate body and source of authority under the Peace Agreement delegated to the United Nations all powers necessary to ensure the implementation of the Agreement. The United Nations Security Council in turn established the UNTAC which was given all powers necessary to ensure the organisation and conduct of free and fair elections and entrusted the responsibility for direct control or supervision in the areas of maintenance of law and order, protection of human rights, law enforcement, and judicial processes. The Paris Peace Accords soon brought changes in Cambodia's political scenery and a relatively more open political climate with an amendment of the State of Cambodia's Constitution to allow a multi-party system.

With the advent of the UNTAC, transplanting foreign laws and assimilating Cambodian law with international practice started immediately. Cambodian law-makers faced with the more pressing tasks of building a new legal system and making laws almost out of nothing willingly accepted the suggested uses of foreign legal terminologies, structures, and methodologies at an unprecedented pace. During the period, the United Nations Electoral Law and the annexed Code of Conduct was passed along with other regulations such as the Provisions Relating to the Judiciary and Criminal Law and Procedure Applicable in Cambodia during the Transitional Period and the 1993 Law on Criminal Procedures. The SNC has also acceded to various other international instruments including the Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights on 20 April 1992.

On January 1992 the situation changed dramatically for the better since with the lifting of the U.S. trade embargo and Cambodia rejoining the World Bank Group. More laws and regulations were enacted to support the development of the private sector. With the enactment of a new Labour Law in 1992 a new Ministry of Social Affairs and Labour was subsequently created to take additional responsibilities in the labour sector.

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Neutrality and National Unity of Cambodia; and (iii) the Declaration on the Rehabilitation and Reconstruction of Cambodia.

Another important law passed in 1992 was the Land Law. This act formally completed the process of land reform that had begun in the late 1980s. The Land Law was very similar to previous Cambodian Civil Codes, recognizing succession, will, sale, gift, and possession as the processes by which ownership could be transferred. Unfortunately, the possibility to claim ownership solely on the basis of possession, coupled with the lack of documentation of the ownership and possession rights established through the 1989 land reforms and the 1992 Land Law, set the stage for land grabbing and power abuses. A massive land grab began, especially in Phnom Penh. Some officials began to act as though State property and vacant private property (or property that could be rendered vacant by the use of force) was theirs to occupy, "own" and therefore sell. The rushed passage of the 1992 Land Law to some extent legitimized these expropriations.<sup>183</sup>

#### ***7. 1993 – present: The Post Peace Process and the transition to a democratic and market economy***

Since 1993 legal reforms have moved to center stage as an important priority on the development agenda of Cambodia, to a far greater extent than has been the case at any previous time since 1975.<sup>184</sup> These are being undertaken to foster development of a vigorous private sector, to respond to the requirements of the regionalization and globalization of world trade and to make the Government more accountable to its own citizens. By the day the economy became increasingly complex: urbanization rates increased, the labor force shifted from agriculture into light manufacturing and services, markets expanded, and the enterprise sector grew. Cambodia's membership in ASEAN and its accession to WTO required economic strategies that were more adaptable to the changing environment. Against this backdrop Cambodia was hard pressed to develop a legal framework that would provide flexibility for market agents and stable institutions to enforce contracts and property rights and enhance the predictability, transparency, and accountability of state actions.

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<sup>183</sup> See Gottesman, above n 50, 318-23.

<sup>184</sup> For the period 1993 to 2000 consult a three volumes compendium of laws, decrees, regulations, circulars and decisions. Sok Siphana (ed), *Compendium of Cambodian Laws* (1995), (1997), (2000).

## II. KEY LEGAL DEVELOPMENTS SINCE THE 1993 PARIS PEACE ACCORDS

### A. *Macro-economic framework*

The following highlights the broad accomplishments of the Government along the line of the major development themes. The Government made considerable headway in enacting numerous laws needed to underpin the good functioning of a free market economy although the initial focus was on improving the overall environment in which the Official Development Assistance (ODA) could operate. At the heart of this thrust is a set of principles, which the Government considers to be necessary conditions for the development of a vibrant private sector: private ownership; the sanctity of contracts; and the transparency and predictability of public administration.

#### 1. *Public Sector Management*

The management of the public sector's activities is primarily concerned with providing an appropriate environment for investment, banking and finance. Among the accomplishments in this area are:

(a) *Public Finance Reforms:* The Government recognized that sustained improvements in the economic environment hinged on the implementation of key institutional changes, coupled with disciplined fiscal policies. Financial control and budgetary accountability were strengthened considerably with the passage of an Organic Budget Law in late 1993.<sup>185</sup> The annual Financial Management Law provides the legal basis for major fiscal reforms and establishes principles that are regarded by the government as being central to the orderly management of public finances. Since, several other initiatives were undertaken, namely: Sub-Decree on Treasury Notes<sup>186</sup>; a Royal Decree on the Status of Administrative Establishments;<sup>187</sup> and a Law on the Financial Management of Provinces and Municipalities.<sup>188</sup>

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<sup>185</sup> *Law on Organic Budget 1993.*

<sup>186</sup> *Sub-Decree on Treasury Notes 1997.*

<sup>187</sup> *Royal Decree on the Status of Administrative Establishments 1997.*

<sup>188</sup> *Law on the Financial Management of Provinces and Cities 1998.*

(b) *Fiscal reforms:* Driven by the need to build a modern tax system, the government passed in 1997 a Taxation Law<sup>189</sup> aiming at increasing substantially state revenues and at providing the legal basis for major fiscal reforms. Strict implementation of the tax law was ensured through a series of implementing regulations such as Sub-decree on Valued Added Tax,<sup>190</sup> Regulations on Salary Tax<sup>191</sup> and Regulations on Turnover Tax<sup>192</sup>. Institution wise, the Sub-decree on the Organization of the Ministry of Economy and Finance<sup>193</sup> was adopted paving the way for a clearer mandate of the ministry to consolidate the reforms put in place over the previous years, i.e. centralization of the budget, assignment of financial comptrollers to all ministries, competitive bidding for acquisition of goods and services, conduct of audits on public expenditures).

(c) *Transparency and Accountability:* The Government recognized the importance of transparency and accountability to earn the confidence of the international donor community, foreign investors, and domestic market participants. The Sub-decree on Financial Control<sup>194</sup> and the Sub-decree on the General Rules and Principles Governing Public Accounting<sup>195</sup> and their implementing regulations were passed in an effort to make certain that all revenues and expenditures flow through the budget and in ensuring openness in procurement and contracting. Subsequently the new public procurement system became operational under the authority of Sub-decree on Public Procurement.<sup>196</sup>

The Audit Law<sup>197</sup> was passed in 2000 and empowered the Auditor-General to conduct an examination or review of transactions, accounts, systems and controls of government organizations, in accordance with generally accepted auditing standards.

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<sup>189</sup> Law on Taxation 1997.

<sup>190</sup> Sub-decree on Valued Added Tax 1999.

<sup>191</sup> Regulations on Salary Tax 1997.

<sup>192</sup> Regulations on Turnover Tax 1997.

<sup>193</sup> Sub-decree on the Organization and Functioning of the Ministry of Economy and Finance 1999.

<sup>194</sup> Sub-decree on Financial Control 1995.

<sup>195</sup> Sub-decree on the General Rules and Principles Governing Public Accounting 1995.

<sup>196</sup> Sub-decree on Public Procurement 1995.

<sup>197</sup> Law on Audit 2000.

## 2. *Financial Sector Management*

Financial sector reforms which signalled the shift in economic policy in the mid 1990s were institutionalized with the passage of the Law on the Organization and Conduct of the National Bank of Cambodia (NBC)<sup>198</sup> in 1996 followed by the Law on Banking and Financial Institutions,<sup>199</sup> the Law on Foreign Exchanges.<sup>200</sup> These laws were considered as key elements in the establishment of a modern legal framework for the financial system. They allowed the NBC to determine and implement monetary and exchange-rate policies, to issue licenses, and to regulate and supervise banks, financial institutions, and firms operating in the foreign exchange and precious stones and precious metals markets.<sup>201</sup> The ultimate goal was to strengthen the NBC to better regulate the commercial banking sector.

With the passage of the Financial Institutions Law<sup>202</sup> in mid 1999, the NBC conducted a bank relicensing program based on increased capital requirements and a rating system.<sup>203</sup> In addition, the restructuring process legally separated the state owned Foreign Trade Bank of Cambodia (FTBC) from the NBC and led to the recapitalization of the former in mid 2001.<sup>204</sup> The financial sector was further reinforced with the enactment of five laws, marking the next stage of modernization of the country financial system.<sup>205</sup>

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<sup>198</sup> *Law on the Organization and Conduct of the National Bank of Cambodia (NBC) 1996.*

<sup>199</sup> *Law on Banking and Financial Institutions 1999.*

<sup>200</sup> *Law on Foreign Exchanges 1997.*

<sup>201</sup> For a detailed list NBC regulations see Annex 3.3.

<sup>202</sup> *Law on Financial Institutions 1999.*

<sup>203</sup> Out of 29 commercial banks which were subject to a relicensing process, 11 of them were declared nonviable and had their licenses revoked. A restructuring process was initiated for 14 potentially viable banks leaving only 4 viable banks unaffected by the process.

<sup>204</sup> Regulation on the restructuring the Foreign Trade Bank of Cambodia (FTBC) and the functions of its subordinated offices 1999.

<sup>205</sup> Cambodia's infant financial sector has positively benefited from the lessons of the Asian financial crisis. It was only in 1991 that the Cambodian banking system was opened up to private and foreign commercial banks. The operation of commercial banks was generally confined to Phnom Penh, though a few have established provincial branches. The Asian crisis disclosed the weaknesses of the financial systems in the crisis countries, particularly their vulnerability to large outflows of foreign private capital and the failure of governments to establish sound financial policies and systems. Cambodia's under-development was not altogether disadvantageous as it enabled the country to learn from the successes and failures of the crisis countries.

(a) *The Insurance Law*:<sup>206</sup> It was passed in 2000 with the aim of strengthening the supervision and control of the insurance business and contributing to the development of the insurance industry. The law provided that only insurance companies, agents and brokers are eligible to underwrite insurance business under the control and supervision of the Ministry of Economy and Finance.

(b) *The Accounting Law*: It was passed in 2002 with the aim of improving financial reporting, including reporting of profits for tax purposes.

(c) *The Negotiable Instruments and Payments Transactions Law*: It was passed in 2005 with the aim of reducing payment system risk by eliminating legal uncertainties and by providing a firm foundation for a modern payment system.<sup>207</sup> While reinforcing the role and power of the central bank, the law provided the legal underpinning for the development of an inter-bank market, promoted financial intermediation and defined a payment system.

(d) *The Secured Transaction Law*: It was passed in 2006 with the aim of establishing a framework authorizing a property owner to use his or her business property, including his or her equipment, inventory and accounts, as security for a business loan.<sup>208</sup>

(e) *The Securities market Law*: It was passed in 2007 with the aim of providing the legal framework for the issuance and trading of stocks and bonds. The passage of the law marked the government's concrete move to establish its first stock market by 2009.<sup>209</sup>

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<sup>206</sup> *Law on Insurance 2000*.

<sup>207</sup> This law is, for historical purposes, very important for the country. Nearly three decades had passed since the Khmer Rouge regime completely destroyed the payments system, the use of currency and the banking system.

<sup>208</sup> Although the new law is a positive first step, the market for movable property financing has yet to materialize. Cambodia's banking system is still conservative and extremely liquid. Most banks are very reluctant to secure loans with anything but land and buildings. Almost all banks actively avoid taking security interests in movables or intangibles. Non-bank lenders, such as microfinance institutions, use guarantees or other means of assuring repayment.

<sup>209</sup> The creation of a stock market would likely boost foreign direct investment, which totalled just \$483 million in 2006, compared with \$2.3 billion and \$9.7 billion in neighboring Vietnam and Thailand respectively. See UNCTAD, *World Investment Report* (2007).



The passage of the last 2 laws was to a large extent also driven by the need of the Cambodian authorities to project its political will to be in compliance with the principles and provisions of the WTO General Agreement on Trade in Services.

## **B. *Legal development supporting private sector development and economic integration***

### **1. *Privatization***

The commitment of the government to the privatization of its state-owned business enterprises was reflected in its 1994 privatization strategy which called for a program of comprehensive and systematic reduction in the number of remaining public sector enterprises. Subsequently, the government enacted a Law on the General Statutes of Public Enterprises,<sup>210</sup> followed by a series of implementing regulations to complete the so-called Code on Public Enterprises.<sup>211</sup> The Code provided rules for the operation, governance and supervision of all public enterprises and put them under the same legal framework as the private enterprises. Although granted independent legal personality and ostensible financial autonomy, each public enterprise is placed under a ministry or some other public authority and made subject to various State controls.<sup>212</sup>

### **2. *Commercial Laws and Corporate Governance***

The private sector generally recognized that existing laws, though they can fill the gaps in the basic commercial legal framework, remain deficient and have adverse motivational effects on entrepreneurs and potential investors. Continuous efforts have

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<sup>210</sup> *Law on the General Statutes of Public Enterprises promulgated 1996.*

<sup>211</sup> Sub-decree on the Modalities for Privatizing Public Enterprises 1995; Sub-decree on the Implementation of the Law on the General Statutes of Public Enterprises 1997; Sub-decree on Auditors of Public Enterprises 1997; Instruction Circular on the Privatization of Public Enterprises 1995.

<sup>212</sup> In fact, all decisions related to the disposition of assets, merger, acquisition, and liquidation of public enterprises are made by government sub-decree upon joint recommendations of the respective overseeing ministry and the Ministry of Economy and Finance and the agreement of the governing board of the public enterprises. For a detailed analysis of the Code of Public Enterprises, see Sok Siphana, *Review of the Current and Projected Legal And Fiscal Environment Concerning the Commercialization of Industrial Units under Government* (report prepared for Opifer Education Development Services. Ltd. (1999) (unpublished).

been extended since 1993 to prepare a commercial code, comprising eight sets of laws, two of which were enacted in 1995, namely the Law bearing upon Commercial Regulations and the Commercial Register<sup>213</sup> and the Law on the Chamber of Commerce,<sup>214</sup> and two more in 2005, the Business Enterprises Law<sup>215</sup> and the Commercial Arbitration Law.<sup>216</sup>

(a) *The Commercial Register Law:* The law defines requirements and procedures associated with the registration of commercial enterprises, as well as forms of such enterprises. As part of its commitment to market liberalization, the Ministry of Commerce (MoC) lifted all restrictions on foreign companies and allowed them to engage freely in trading activities. Foreign companies needed only to register with the Ministry of Commerce and pay the required tax. Previously only Cambodian owned companies (51% shareholding owned by Cambodian nationals or Cambodian entities) were allowed to engage in import and export activities.<sup>217</sup>

(b) *The Law on the Chamber of Commerce:* The law enables initially the establishment of the Phnom Penh Chamber of Commerce. Over the years, provincial chambers were also created.

(c) *The Business Enterprises Law:* The law which provides for the creation of four types of legal persons - general partnership, limited partnership, private limited company and public limited company – set the overall framework for commercial transactions and contractual relations, an element essential to the effective functioning of a market system. It also provides for a corporate form with independent legal personality and limited liability for shareholders and defines the rights and responsibilities of the key participants in the firm, including its owners, managers, and creditors.

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<sup>213</sup> *Law bearing upon Commercial Regulations and the Commercial Register 1995.* The law was amended in 1999 to provide for the transfer of the jurisdiction over the registration and maintenance of the Commercial Register from the Commercial Court to the Ministry of Commerce.

<sup>214</sup> *Law on the Chamber of Commerce 1995.*

<sup>215</sup> *Law on Business Enterprises 2005.*

<sup>216</sup> *Law on Commercial Arbitration 2005.*

<sup>217</sup> *Regulation on Trading Activities of Commercial Companies 2000.*

(d) *The Commercial Arbitration Law:* The law offers the business community with an alternative dispute settlement mechanism for their unresolved commercial disputes as well as a general confidence-building measures in a current legal and judicial environment of great uncertainty. The passage of the law provided also the necessary implementing regulations for the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the NY Convention) to which Cambodia acceded since 1960. Together with the ratification of the International Center for Settlement of Investment Disputes Convention ("ICSID convention") in 2001, the passage of the law helped businesses reduce costs and the risks of unfair treatment in commercial disputes. As part of its WTO commitments, Cambodia also committed to establish a specialized court to adjudicate commercial disputes and enforce foreign arbitral awards.

### 3. *Property Rights*

The 2001 Land Law marked a major development in the recent history of land management by providing the appropriate legal framework for recognizing private property and for proper land use planning.<sup>218</sup> The enactment of this key law and its implementing regulations unleashed the dynamism of the real estate sector and paved the way for their usage as collateral in the process of capital mobilization. Markets in land transactions and mortgages over land were deeply stimulated as a result.<sup>219</sup>

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<sup>218</sup> An abbreviated history of Cambodian land law helps to illuminate some of the basic concepts of the 2001 Land Law. Historically, before France assumed administrative control of Cambodia (in the 1860s), the *ownership* of all land was the King's. However, the law recognized a private right of *possession*, which a private person could acquire by occupying and using the land, and which such a person could then sell or otherwise dispose of. During the French administrative period (which ended with independence in 1953), a French-style Cambodian Civil Code was adopted. This code abolished King/state ownership, but retained the old concept of "possession," making it the means for acquiring private ownership land. That code and those concepts remained in force after the Cambodian independence (1953) up to the Democratic Kampuchea (Khmer Rouge) period of 1975-79. In that period private ownership was abolished and land ownership records were destroyed en masse, a condition which essentially continued through the Peoples' Republic of Kampuchea period (1979-89).

Thus, both land ownership and land records were in a state of chaos when the new State of Cambodia was created in 1989. The first effort to deal with this was a new Land Law enacted in 1992, which restored the former Civil Code concepts of private ownership and of possession leading to private ownership. The current 2001 Land Law greatly expands on and replaces that 1992 Land Law. See, eg, East-West Management Institute, *Land law of Cambodia: A Study and Research Manual* (2003).

<sup>219</sup> Researches and analysis about land issues in Cambodia are plentiful. See, eg, Hanna Sophie Greve, *Land Tenure and Property Rights in Cambodia* (1993); Sik Boreak, 'Land Ownership, Sales and Concentration in Cambodia' (Working Paper No. 16, CDRI, September 2000); Chan Sophal, Tep Saravy and Sarthi Acharya, 'Land Tenure in Cambodia: a Data Update' (Working Paper No. 19,

#### 4. *Intellectual Property Rights (IPR)*

Cambodia's drive behind IPR reforms came about as a result of forces outside the country and was initially kick-started with its membership in the World Intellectual Property Organization (WIPO) on 25 July 1995 followed by the signing of the Bilateral Trade and Intellectual Property Rights Protection Agreement (BTA) with the United States in 1996. Membership in regional groupings like the ASEAN and participation in the ASEAN Framework Agreement on Intellectual Property Cooperation and the accession to the Paris Convention in 1998 have largely influenced the country's IPR development.<sup>220</sup>

However the real momentum behind IPR reforms came with the process of WTO accession and its resulting commitments under the TRIPS. Several WTO members voiced their concerns on the issues and encouraged Cambodia to put more efforts to establish a TRIPS-consistent regime in IPR, in particular in the critical area of Trademarks and Copyrights. As a result, the Law on Marks, Trade Names and Acts of Unfair Competition<sup>221</sup> was passed in 2002 followed by the Law on Patents, Utility Model Certificates and Industrial Design<sup>222</sup> and the Law on Copyright and Neighboring Rights<sup>223</sup> in 2003. The draft Law on Geographical Indications and the draft Law on Layout Designs of Integrated Circuit were scheduled to be adopted in the following years. The enactment of the three core IPR laws, a monumental challenge in itself, helped in removing the ambiguities and inconsistencies as found in the 1993 Law on Criminal Procedures and the 1993 UNTAC Provisions on Criminal Law.<sup>224</sup> In a broader context, Cambodia is considering joining the following treaties and conventions, namely: (i) the Convention for the Protection of Literary and Artistic

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CDRI, October 2001); Chan Sophal and Sarthi Acharya, 'Land Transactions in Cambodia, An Analysis of Transfers and Transaction Records', (Working Paper 22, Cambodia Development Resource Institute (CDRI), July 2002); Stockholm School of Economics and Supreme National Economic Council, *Land and Human Development in Cambodia* (2007).

<sup>220</sup> According to the Ministry of Commerce statistics about 1,900 product trademarks, both local and imported have been registered in 2007 compared to only 1,400 in 2006. Local trademarks have increased by 25 percent. See 'Cambodian trademarks owners begin to appreciate intellectual property', *Development Weekly* (Phnom Penh) 10 – 16 December 2007.

<sup>221</sup> *Law on Marks, Trade Names and Acts of Unfair Competition 2002.*

<sup>222</sup> *Law on Patents, Utility Model Certificates and Industrial Design 2003.*

<sup>223</sup> *Law on Copyright and Neighboring Rights 2003.*

<sup>224</sup> *UNTAC Provisions Relating to the Judiciary and Criminal Law and Procedure 1992. Arts 47, 48.*

Works (Berne Convention); (ii) the Paris Convention; (iii) the Patent Cooperation Treaty (PCT); and (iv) the International Convention for the Protection of New Varieties of Plants, 1978 or 1991 (UPOV Convention).

## **5. *Consumer Protection and Product Liability***

A Law on the Quality of Goods and Services<sup>225</sup> was passed in 1999 with the aim of establishing the general basis for product liability through general principles of contract and tort liability. The law, along with a series of implementing regulations<sup>226</sup>, provides for the establishment of quality control of exported and imported products as well as regulates the production/manufacturing and commercialization of both goods and services in the stream of commerce in Cambodia. It also imposes liability on a third party irrespective of him or her being a party or not to a contract, for falsification or attempt to falsify products, goods and services. All forms of commercial advertising are prohibited if they are deceitful, misleading, false, likely to cause confusion on the quality and safety of products, goods and services.<sup>227</sup>

## **6. *Industrial relations***

In 1997 in a move to reaffirm its free market economy orientation, Cambodia passed a new Labor Law<sup>228</sup> which provides for the necessary legislative cornerstone to govern employer-employee obligations and industrial relations. The law, which was drafted with the assistance of the ILO, is a modern law incorporating all of the basic international norms. The law, which opted for a much more paternalistic philosophy regarding the employer-employee relationship, empowered the Ministry in charge of Labor to issue regulations governing labor standards and related matters for labor protection. By the ILO standard, the labor law is very comprehensive and contains regulations regarding labor contracts, salary wages, labor unions, collective labor

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<sup>225</sup> *Law on the Quality of Goods and Services 2000.*

<sup>226</sup> Regulation on the roles and responsibilities of group in charge of quarantine at border checkpoints 1999; Regulation on Measures Against Food Products Devoid of Appropriate Packaging Labels 1999; Regulation on the Registration of Industrial Products 1999.

<sup>227</sup> For a general theory of liabilities in Cambodia, see Sok Siphana and Sarin Denora, 'Cambodia' in Jocelyn Kellam (ed) *Product Liabilities in the Asia Pacific (1999)* 42-50.

<sup>228</sup> *Labor Law 1997.*

agreements, social insurance, labor safety, sanitary working conditions and vocational training.

At the international level, Cambodia ratified many International Labor Organization (ILO) conventions in 1999. The first 7 ILO Conventions were identified by the ILO's Governing Body as being fundamental to the rights of human beings at work, irrespective of levels of development of individual member States.<sup>229</sup> During the same year, Cambodia signed with the US the Agreement Relating to Trade in Cotton, Wool, Man-made Fiber, Non-Cotton Vegetable Fiber and Silk Blend Textiles and Textile Products in which provisions for the protection of labor were included.<sup>230</sup>

In 2007 amendments to the Labor Law were made in response to the pressure to attract more foreign investors and to create more employment. The new articles are aimed at accommodating future industries such as oil refineries and cement plants, and are expected to provide huge advantages in term of employment creation.<sup>231</sup>

## 7. *Foreign Direct Investment*

In 1994, the creation of an investment climate open to foreign investment was signaled through the passage of the Law on Investment (LoI),<sup>232</sup> resulting in a substantial increase in FDI. The brevity, tone and simplicity of the LoI reflected a clear desire on the part of the Government to foster confidence among foreign investors. The 1994 LoI and its subsequent implementation regulations set out the basic policy and legal framework of the investment environment.<sup>233</sup> New implementing regulations for the LoI were passed over the years to supplement the tax measures on incentives granted to investors.<sup>234</sup> In February 2003 the LoI was

<sup>229</sup> See Annex 3.4 for a list of ILO conventions ratified by Cambodia.

<sup>230</sup> It is worth noting that Cambodia is the first Least Developed Country (LDC) to have signed a textile agreement with the US linking trade and labor conditions.

<sup>231</sup> The new articles stipulate that nightshift salaries which used to be 100 percent more than daytime shift salaries will be reduced to 30 percent. *Development Weekly* (Phnom Penh) 11 – 17 July 2007.

<sup>232</sup> *Law on Investment 1994*.

<sup>233</sup> Sub-decree No. 51 on the Organization and Functioning of the Council for the Development of Cambodia 1995; Implementing Sub-decree No. 88 of the Law on Investment 1997; Sub-decree No. 11 on Built-Operated-Transfer (BOT) 1998.

<sup>234</sup> Regulations on the provision of customs duty exemption incentives for support industries in subsequent years and authorization for shares transfer 1999; Instruction Circular on the

amended in response to the investors concerns for transparency.<sup>235</sup> Investments in Export Processing Zones (EPZs), as stipulated in the LoI, was decreed along with the industrial diversification of small to medium enterprises.<sup>236</sup> In 1998 the autonomous port of Sihanoukville, the only international deep sea port, was corporatized as an financially autonomous port.<sup>237</sup>

In 2005 the risk management strategy sub-decree, a vital measure for reducing the costs of doing business, and the sub-decree creating special economic zones (SEZs) were both passed. The rationale behind the establishment of the SEZs are to provide investors, within the confine of export processing zones and free trade zones, with adequate infrastructure and supportive facilities to respond effectively to the challenge of economic diversification. Four growth poles were identified for industrial development.<sup>238</sup>

International treaties and bilateral agreements were acceded to or signed to facilitate a more secure environment for foreign investment.<sup>239</sup> The aims of these instruments were to provide the reciprocal encouragement and protection of investment flows occurring between the signatory states. To lessen political risks such as confiscation, expropriation, domestication, or other government interference, the agreement with the Overseas Private Investment Corporation (OPIC) of the United States<sup>240</sup>, the Multilateral Investment Guarantee Agreement (MIGA) Convention and the

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management and usage of investment incentives by investment enterprises 2000; Notice on the obligations of investment enterprises to provide information on their import and export activities 1999.

<sup>235</sup> For a detailed account of the investors' concerns, see specifically Foreign Investment Advisory Service (FIAS), *Report on the Review of the Law on Investment* (2000).

<sup>236</sup> Sub-Decrees on the establishment of the Stung Hav-Sihanouk Ville Industrial Zone 1995, 1996.

<sup>237</sup> Sub-decree on the corporatization of Sihanoukville port 1998.

<sup>238</sup> The SEZs are planned in Koh Kong and Poipet near the Cambodia-Thailand border, in Bavet and Phnom Den at the Cambodian-Vietnam border, in Phnom Penh and in Sihanoukville deep seaport area. See Ministry of Commerce, *Draft Final Report on The Study on Regional Development of Phnom Penh-Sihanoukville Growth Corridor In Kingdom of Cambodia* (2003).

<sup>239</sup> See Annex 3.5 for a list bilateral investment protection treaties.

<sup>240</sup> Investment Incentive Agreement between the Royal Government of Cambodia and the Government of the United States of America, Phnom Penh, 4 August 1995.

Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID) were ratified.<sup>241</sup>

## 8. *International Trade and Economic Integration*

Since 1993, Cambodia has concluded numerous agreements and memoranda of understanding relating to economic cooperation, foreign trade and intellectual property rights protection. Most of these agreements which provided for MFN and national treatment were with countries that are members of the World Trade Organization (WTO).<sup>242</sup> Cambodia has also made it a priority to accede to various multilateral economic organizations.<sup>243</sup>

Cambodia acquired its full membership into ASEAN in June 1999 following the ratification of 26 ASEAN agreements.<sup>244</sup> The legal framework for import (and export) tariffs, which was based on the Law on Import and Export Duties of 15 September 1989, continued to be adjusted and enhanced with a view to respond to regional and global market forces.<sup>245</sup> As part of its process of accession into ASEAN Free Trade Area (AFTA), Cambodia rationalized its import tariff structure and reduced gradually the import tariffs applied to its ASEAN trading partners within the framework of the Common Effective Preferential Tariff Agreement (CEPT).<sup>246</sup> With the passage of the 1997 Law on Foreign Exchange, formal restrictions on the provision of foreign exchange for certain current transactions were eliminated and the *de facto* and *de jure* exchange regimes aligned.

At the multilateral level, Cambodia applied for accession to the World Trade Organization (WTO) in October 1994. After several years of negotiations, Cambodia submitted on 22 July 2003 its acceptance of the terms and conditions of membership

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<sup>241</sup> *Law on the adoption of the membership of the Kingdom of Cambodia to the Multilateral Investment Guarantee Agency 1999.*

<sup>242</sup> See Annex 3.6 for a list bilateral trade agreements.

<sup>243</sup> See Annex 3.7 for membership in multilateral economic organizations.

<sup>244</sup> See Annex 3.8 for a full list of ASEAN Agreements.

<sup>245</sup> See Annex 3.9 for a full list of regulations affecting import and export activities

<sup>246</sup> Nearly all tariffs were to be eliminated by AFTA members in 2003, and in the case of Cambodia and Lao P.D.R. in 2008.



set out in the accession protocol. The Fifth Ministerial Conference approved on 11 September 2003 Cambodia's entry to the WTO subject to ratification. Ratification of the protocol was made by the Parliament on September 2004. Cambodia made history, along with Nepal, by becoming the first (and the only two) least-developed countries (LDCs) to have succeeded in gaining accession to WTO since the transformation of the latter from the General Agreement on Tariffs and Trade (GATT) in 1995.

Accession to the WTO has the effect of pushing Cambodia to accelerate its reform process forward at an even more impressive pace—from implementing legal and domestic policy reforms, ensuring uniform and impartial implementation of trade commitments with much greater transparency and security, and strengthening of prudential regulation and supervision. In a decision taken on 27 February 2004, the Council of Ministers identified 101 WTO accession related working programs and assigned them to each respective ministry and government agency with a specific deadline.<sup>247</sup> As part of the WTO accession package, the Cambodian authorities committed to enact 46 laws, of which more than 1/3 were already passed. The remaining laws will now most likely be passed during the next several years.

## **9. *Environmental Protection and natural resources management***

The Government expressed the importance of natural resource protection through the enactment of the Environmental Law<sup>248</sup> and various implementing regulations.<sup>249</sup> At the international level Cambodia ratified key conventions such as: the Convention on Climate Change<sup>250</sup> which requires protection of greenhouse gas reservoirs, including forests; and the Convention on Wetlands of International Importance Especially as Waterfowl Habitat<sup>251</sup> which commits the Government to protection of wetland

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<sup>247</sup> See Ministry of Commerce, Work Program of the Royal Government of Cambodia Resulting from Cambodia's Accession to the World Trade Organization, February 27, 2004.

<sup>248</sup> *Law on Environmental Protection and Natural Resources Management 1996.*

<sup>249</sup> Sub-Decree on Environmental Impact Assessment Process 1999; Sub-Decree on Solid Waste Management 1999; Sub-Decree on Water Pollution Control 1999.

<sup>250</sup> *Law on the Ratification of the Convention on Climate Change 1996.*

<sup>251</sup> *Law on the Ratification of the Convention on Wetlands of International Importance Especially as Waterfowl Habitat 1996.*

environments and forests. In response to loopholes in the 1988 forestry law<sup>252</sup>, a new Forestry Law was enacted in 2002<sup>253</sup> after many years of preparation and a multitude of technical studies. The law establishes a legal framework for the administration, allocation and management of forest resources. On the mining and petroleum sector, the government is still trying to create a proper legal framework to regulate the sectors.<sup>254</sup>

### **C. *Restructuring State Institutions***

The Government has long acknowledged the country's limited institutional capacity and governance problems as serious cross-cutting issues with far reaching development consequences. Corruption in Cambodia is often cited as being endemic from the top down and throughout all levels of society. A culture of impunity for influential individuals continues to pervade society. Low, inequitable and delayed wages further fuel corruption. Given the pervasive nature of corruption in Cambodia, it is obvious that the challenge of addressing it is daunting. For that matter, the Government has adopted an administrative reform program with a view to improve institutional capacity and effectiveness and to start tackling good governance as an important pre-condition in achieving sustainable development. The programme is organized around the following three general thrusts.

#### **1. *Restructuring the Public Sector***

The Law on the Organization and Functioning of the Council of Ministers<sup>255</sup> was passed with the aim of defining the mission and mandate, roles and responsibilities of the Government followed by a series of laws organizing ministries and state secretariats.<sup>256</sup> Within the framework of an administrative reform program, the

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<sup>252</sup> Kret Law No. 35 KR.C of June 25, 1988 is generally considered the single law governing forestry practice up until 2002.

<sup>253</sup> *Forestry Law 2002*.

<sup>254</sup> Currently under review at the Council of Ministers are two drafts: the draft Law on Petroleum Exploration and Development, Mines and Mineral Laws, and the draft Sub-Decree on the Establishment and Administration of a Licensing System for Mineral Exploration and Mining Operations.

<sup>255</sup> *Law on the Organization and Functioning of the Council of Ministers 1994*.

<sup>256</sup> 21 laws were passed to establish the mandates of various ministries and state secretariats.

government articulated at the outset a comprehensive plan to reorganize its administration. Multi-prong reform activities were pursued diligently to re-establish a suitable enabling administrative environment. Numerous administrative and advisory bodies were created along with the re-establishment of basic institutional elements like the codification of legal texts and the publication of the Official Journal.<sup>257</sup>

## **2. *Reforming the Civil Service and Strengthening Provincial Administration***

A Law on the General Statutes of the Civil Service<sup>258</sup> spelled out the rights and obligations of civil servants based on fundamental principles such as: proper classification of positions; specific qualifications for each position; competitive based recruitment; and appropriate salary scales. Two sub-decrees<sup>259</sup> and their subsequent implementing regulations<sup>260</sup> established the legal framework, including the definition of the rights and responsibilities of the different jurisdictions and the legal status of provincial personnel.

## **3. *Security and Public Order***

The Government is committed to transforming the Cambodian society into one that is non-military and into one where peace and order prevail. Demobilization and the absorption of demobilized soldiers - including the *Khmer Rouge* - into productive civilian occupations was considered as a necessary step in the transformation process. After the 1998 general elections, the outstanding achievement of the Government was the implementation of the pacification policy which brought an end to the Khmer Rouge political and military organization through peaceful means. It was the first time in the history of Cambodia that the whole territory of the nation has been legitimately, integrally and constitutionally put under the control of a single state. Meanwhile, the

<sup>257</sup> Sub-Decree on the Establishment of the Administrative Reform Council 1999; Decree on the General Principles of the Organization of the Civil Service 1997; Decree on the Articles of Association of Administrative Institution 1997; Decree on the Establishment of the Supreme Council of State Reform 1999; Sub-Decree on the Creation of the Council of Jurists 1994.

<sup>258</sup> *Law on the General Statutes of the Civil Service 1994.*

<sup>259</sup> Sub-Decree on the Organization and Functioning of the Ministry of Interior 1993; Sub-Decree on the Administrative Structure of *Khum* [commune] or *Sangkat* [district] 1994.

<sup>260</sup> Regulations on the Functions of the Governors and Vice-Governors of the provinces, municipalities and of their subordinate services; Regulations on the Roles, Responsibilities and Structure of the Provincial and Municipal Administrations.

Government implemented a military reform aimed at achieving the neutralization policy of the Royal Cambodian Armed Forces (RCAF). Military personnel were retrenched and the command structure reorganized.<sup>261</sup> With national reconciliation strengthened, peace and political stability in the country ensured, the Government focused its efforts on safeguarding public order and security, and eliminating illegal weapon use.<sup>262</sup>

### III. KEY DEVELOPMENT OF THE JUDICIAL SYSTEM

#### A. *Organization and jurisdiction of the Cambodian judicial system*

The Cambodian court system has experienced many changes following nearly three decades of neglect. It is largely based on the French style judiciary and has evolved slowly from the communist-dominated system of the 1980s. The 1993 Law on the Organization and Functioning of Adjudicate Courts<sup>263</sup> enacted during the period of the State of Cambodia by an ad hoc parliament together with the UNTAC Law<sup>264</sup> provided the starting point of the judicial structure and organisational framework of the courts. The enactment of the Law on the Supreme Council of Magistracy<sup>265</sup> sets the stage for the re-organization of the Judiciary followed by the establishment of the Constitutional Council,<sup>266</sup> the highest body called for in the 1993 Constitution.

#### 1. *The Constitutional Council (CC)*

The system of constitutional control did not exist in the history of Cambodia. The 1947 Constitution, as successively modified by the 1964 Constitution, provided for the interpretation of constitutional texts to the National Assembly but did not state the constitutionality control. The 1972 Constitution of the Khmer Republic set up a system of constitutionality control under the name of Constitutional Court. Despite its

<sup>261</sup> See Annex 3.10 for a list of laws and regulations regulating the military.

<sup>262</sup> See Annex 3.11 for a list of regulations on public order and security.

<sup>263</sup> *Law on the Organization and the Activities of the Tribunals of the State of Cambodia 1993.*

<sup>264</sup> *UNTAC Provisions Relating to the Judiciary and Criminal Law and Procedure Applicable in Cambodia During the Transition Period of 10 September 1992.*

<sup>265</sup> *Law on the Organization and the Functioning of the Supreme Council of Magistracy 1994.*

<sup>266</sup> *Law on the Organization and Functioning of the Constitutional Council 1998.*

name, this body functioned completely apart from the judiciary power. The 1981 Constitution of the People's Republic of Kampuchea vested the interpretation of laws in the Council of State which acted as the Standing Committee of the National Assembly. The 1989 Constitution of the State of Cambodia provided for the interpretation of laws by the Permanent Committee of the National Assembly but did not provide for the interpretation of the Constitution nor for the constitutionality control.

The 1993 Constitution adopted by the Constituent Assembly emerges from the United Nations sponsored election and reflects strong western influence.<sup>267</sup> Chapter XII of the Constitution provides for the establishment of the CC which resembles, in many respects, the French Constitutional Council.<sup>268</sup> The CC is not a tribunal that hears cases but rather an institution that decides only on the constitutionality of laws.<sup>269</sup> Besides ensuring the respect of the Constitution, it is responsible for reviewing and ruling on disputes arising from elections, such as those involving rights of voters, electoral rights of candidates and political parties. Election frauds and irregularities can also be submitted to the CC for final settlement.

## 2. *Supreme Council of Magistracy (SCM)*<sup>270</sup>

The Constitution entrusts the task of ensuring judicial independence and disciplining judges and prosecutors to the King with the help of the SCM.<sup>271</sup> Administrative

<sup>267</sup> Since its promulgation the 1993 Constitution has been amended twice: the first time on 14 July 1994 concerning the delegation of power from the King's signature to the acting Head of State; and the second time on 8 March 1999 for the establishment of the Senate.

<sup>268</sup> There are some differences from the French Constitutional Council, particularly, a *posteriori* control of constitutionality and public hearing of cases concerning general elections. The public hearing is stipulated in the *Law on General Elections 1997*.

<sup>269</sup> The review of the constitutionality of a law by the CC can be undertaken only according to the following three procedures: (i) A law that has been passed by the National Assembly can be forwarded to the CC for review before its promulgation. Only the King, the Prime Minister, the President of the National Assembly, or one-tenth National Assembly members can propose the review; (ii) For a law that has been promulgated, only the King, the Prime Minister, the President of the National Assembly, one-tenth of the Assembly members, or the court may request its review. A normal citizen may request a review through one-tenth of the Assembly members or through the President of the National Assembly; and (iii) Internal rules of the National Assembly and organic laws must be reviewed by the CC before their promulgation with respect to their constitutionality.

<sup>270</sup> In French *le Conseil Supérieur de la Magistrature*.

<sup>271</sup> *Cambodian Constitution 1993*, Art 132-134. The SCM is comprised of nine members, including a representative of the King, the Minister of Justice, two Supreme Court judges, two Appellate judges, and three lower court judges.

authority over the court system is split between the SCM and the Ministry of Justice which oversees the prosecution service and the court clerks. The SCM has constitutional power to oversee and regulate many aspects of the judiciary, including the appointment and discipline of judges.

### **3. *Structure of the Court***

Cambodia has a three-tiered court system comprising of one court of first instance in each of the 23 provinces and two municipalities, a military court, one Court of Appeals, and one Supreme Court. Provincial and municipal courts, located in various provinces and municipalities, are lower adjudicate courts with limited territorial jurisdictions. The Court of Appeals and the Supreme Court both located in Phnom Penh are higher courts with nationwide jurisdictions.

A municipal court decision can be appealed to the Court of Appeals on issues of both law and fact. With a few exceptions, the Supreme Court only hears questions of law. But upon remand to the Court of Appeals, the Supreme Court may also reconsider the facts of the case. In practice, most matters may be appealed for any reason to the Supreme Court if the issue is politically or economically important. The law places few time limits either on when a higher level court may hear an appeal or on rules regarding the order it may schedule appeals. As a result of this ambiguity some cases were delayed for years before their complete re-hearings of the facts.

The Ministry of Justice (MoJ) controls the prosecution service, the court clerks and bailiffs. In addition, the MoJ issues circulars clarifying and interpreting elements of Cambodia's opaque procedural code to facilitate smoother administration of the courts. Despite these circulars, the administrative practices in individual courts vary greatly depending on the attentiveness of the respective president of the court and the initiatives of the court personnel. The Ministry is responsible for monitoring the execution of judgments, although authority in that area overlaps with the Ministry of Interior which controls the judicial police.<sup>272</sup> The ministry is also responsible for

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<sup>272</sup> The 1992 Law on Execution of Judgments provide for court enforcement of civil and criminal judgments. Judgment execution is performed by the individual courts issuing the judgment and may be assisted by the judicial police if and when it is necessary to search premises, seize property, or make an arrest.

ensuring uniformity and consistency in the drafting of commercial, civil, administrative, and labor laws.

#### **4. *Court and Case Management***

The Cambodian court administration is a largely ad hoc affair, governed by a series of laws, regulations, circulars, and practice handed down from several different legal regimes over a period of decades.<sup>273</sup> Each court acts autonomously to interpret the law, and often procedures vary widely from one district to the next. In practice, most commercial cases of any size will be heard in Phnom Penh or in a few major provincial courts. The courts are faced with the dreaded problems of backlogs, delays, and other fundamental deficiencies such as excessive pretrial detention, trial in absentia, and problems of judgment writing and enforcement of judgments. Judicial decisions are generally not well reasoned and are not available for publication.

Generally the physical conditions of the courts are quite appalling. Courthouses are overcrowded and dilapidated. Most courthouses nationwide, including the only Court of Appeals, are in a considerable state of disrepair. The court process is document-intensive on the one hand, requiring standard form submissions for each step of a proceeding, but highly informal on the other, with negotiations between the court officials and the parties often resolving cases without the need for formal hearings. Briefs are rarely submitted to court. None of the Cambodian courts are computerized. Records are kept by hand and filed in numbered dossiers. The integrity of court filing systems varies among courts. After cases are disposed, there is no uniform system of record retention and case documents are extremely difficult to access except for the immediate parties to a case. Decisions are almost never published. Lawyers in Phnom Penh frequently cited lack of access to court records, and lack of notice of critical hearing dates and deadlines as significant obstacles to their practice. All these

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<sup>273</sup> One of the most obvious effect of this *ad hoc* affair is unpredictability in the court adjudication. The fact that for a long time Cambodia has no uniform civil code or civil procedure code, civil practice is instead governed by numerous sources, for example, some elements of the 1963 Civil Procedure Law, the 1984 Circular issued by the Ministry of Justice on court procedures, various circulars issued periodically by the Ministry of Justice, along with common practices that have evolved over the last 20 years. A landmark was achieved on 6 July 2006 when the Code of Civil Procedure was promulgated. It took another year before the new code enter into force so as to provide an adequate period for training and familiarization.

shortcomings, combined with the provision of unrealistic salaries for judges and court officials, increase the risk associated with corrupt practices.

## **B. *Other Fora***

### **1. *Alternate Disputes Resolution***

Credible alternatives to the courts for the resolution of commercial disputes have yet to be institutionalized with the exception of the labor disputes. Established in 2000 under the 1997 Labor Law, the Labor Arbitration Council (LAC) was empowered to resolve collective disputes relevant to the interpretation and implementation of the labor law or collective agreements. Although the LAC does not have detailed procedural rules as the court, the few that it has are adequate for the functioning of the body.<sup>274</sup> Since its formation up until 2005 the LAC has heard over 160 cases and issued more than 140 awards with technical assistance provided by the ILO.

### **2. *The Bar and Legal Defense***

On October 1995, following the enactment of the Law on the Bar<sup>275</sup>, an independent Cambodian Bar Association was established followed by the election of the governing Bar Council. The new bar, responsible for the training, supervision and professionalisation of a new generation of Cambodian lawyers, provided a crucial backbone for the promotion and protection of human rights and the establishment of a nascent rule of law in Cambodia. Today, over 470 lawyers are admitted to the bar, with an overwhelming majority practising in the capital.<sup>276</sup>

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<sup>274</sup> The most significant rule relates to the role of the LAC as conciliator of disputes. In the early stage of arbitration proceedings the LAC conducts conciliation or mediation hearings with the parties and tries to bring an amicable settlement without the issuance of an award. Awards of the LAC are not binding if one of the parties chooses a non-binding arbitration. Though the right of the disputing parties to choose a non-binding arbitration has initially weakened the role of the LAC, the consistency of its awards made the institution more and more credible over time.

<sup>275</sup> *Law on the Bar 1995*.

<sup>276</sup> Cambodia suffers from a serious lack of defense lawyers. In 2005, Cambodia had only 259 practising lawyers for a population of some 13 million; some of them working in private practices or with NGOs. More than 60 lawyers were non- practising lawyers. However, the number of law students admitted to the Bar is increasing steadily. See UNDP, *Pathways to Justice, Access to Justice with a focus on Poor, Women and Indigenous Peoples* (2005) 282.



On the legal defense side, the Cambodian courts are orbited by a vibrant and active network of NGOs that seek to supplement and support the court administration. Several legal aid organizations represent clients in court and play a positive role in reinforcing the need for judges and clerks to observe consistent court procedures. NGOs also provide expert commentaries on court administration circulars, and occasionally provide training to court personnel on modern court administration techniques.<sup>277</sup>

### **3. *Legal Education***

Legal education in Cambodia is provided by a handful of public and private institutions offering both undergraduate and masters degrees in law. Most law schools in Cambodia are not internationally accredited, under-resourced, and the quality of the legal education is mixed. The curriculum stresses more criminal and civil procedures than basic commercial practices.

In 2002 the Government established the Royal School for Judges and Prosecutors as part of its commitment to implement the Legal and Judicial Reform Strategy.<sup>278</sup> Given its relative infancy, the school has made substantial and impressive progress towards becoming a sustainable and respected institution within the Cambodian judiciary. The school operates a two-year curriculum that offers judges comprehensive training in all areas of judicial skills, including trial procedures and ethics, and substantive training in criminal, civil, and commercial laws. Candidates must pass a competitive admission examination. The school was recently expanded to include training of court clerks, a vital link in the provision of effective legal services.

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<sup>277</sup> One noteworthy project is the Court Watch, administered by the Center for Social Development (CSD). Court Watch has placed personnel in several courts to record basic statistics such as types of cases filed, procedures used, time for disposition, and the presence or absence of counsel. Though such statistics are not kept by the courts, they are vital to obtaining a better picture of which specific areas are most in need of reform. See the CSD website at <<http://www.csdcambodia.org.kh>>

<sup>278</sup> The school, conducted in cooperation with the French School of Magistracy in Bordeaux, is supported by UNDP, GTZ, and the Japanese and French aid agencies.

Another positive development was the establishment in 2002 of the Bar Association's Lawyers Training Centre (LTC).<sup>279</sup> Governed by the Bar Council under the authority of the Ministry of Justice, the LTC provides training to successful applicants to the Bar as a pre-requisite for admission to the Bar.<sup>280</sup>

### C. *Government Institutions Responsible for the Reform Process*

Due to a host of long-standing difficulties resulting from years of war and crisis, the Government recognized that there were numerous and significant weaknesses in the public institutions that supply Cambodia's legal and judicial services and that many laws needed to be revised, and many institutions revamped, in order to bring them into compliance with the new Constitution and other relevant international human rights treaties which Cambodia is party to.

Various institutional arrangements were made over the years to facilitate reforms. The process started in 1994 with the creation of a Council of Jurists under the Office of the Council of Ministers to assist the Government in formulating reforms.<sup>281</sup> Since, a number of coordinating bodies have been created ostensibly to manage legal and judicial system development. After years of debates the King decreed the formation of the long awaited Council for Legal and Judiciary Reform (CLJR) at the initiative of the Government.<sup>282</sup> While the CLJR was tasked with important functions, it lacked resources and stayed idle for a few years. One of its main achievements though was the initiation of the preparation of the legal and judicial reform strategy.<sup>283</sup> In 2001,

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<sup>279</sup> The LTC is supported by the Japanese Federation of Bar Associations as well as the Canadian and American Bar Associations.

<sup>280</sup> The year-long curriculum includes training in general legal theory as well as civil and criminal law. Civil law topics include business law, intellectual property, e-commerce, taxation law, accountancy law, labor law, international commercial law, and negotiation, conciliation, and arbitration. Instructions are provided by well-qualified Cambodian and international lawyers, judges, prosecutors, and academics.

<sup>281</sup> In fact, the mandate of the Council of Jurists was then to review and recommend in cooperation with relevant ministries and institutions laws and regulations essential to the functioning of the government and to provide legal opinions on matters related to treaties and international agreements.

<sup>282</sup> The Council on Legal and Judiciary Reform (CLJR) is an inter-ministerial task force within the Council of Ministers that is responsible for executing the extensive legal and judicial reform agenda. The CLJR is also the primary point of contact for donor coordination with respect to judicial assistance.

<sup>283</sup> The process was kick started with the commissioning of a legal and judicial diagnostic study under a World Bank Technical Assistance Project. See Gourdon, and Ghelber X., 2000. *Report: Projet de rapport final, Réforme juridique, Diagnostic*, Phnom Penh.

the CLRJ commissioned the drafting of the strategy paper to two members the CLRJ steering committee.<sup>284</sup> After numerous iterations and consultations, the Government approved in 2004 a comprehensive Strategy for Legal and Judicial Reform (SLJR) and circulated an action plan for its implementation.<sup>285</sup>

Subsequently, the Government moved to establish a permanent coordinating body and a programme unit tasked to develop and monitor a time-bound reform strategy. Listed among short-term priorities are some of the measures that have been pending since mid- and late-90s, including the restructuring of the SCM, adoption of the law on the organization and functioning of courts, as well as enactment of the anti-corruption law.

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<sup>284</sup> The draft was prepared by Mr. Sok Siphana, member of the Steering Committee for Legal and Judicial Reform and was submitted to Dr. Heng Vong Bunchhat, Chairman of the Steering Committee for Legal and Judicial Reform. See Sok Siphana, *Formulation of a Legal and Judicial Reform strategy* (2002).

<sup>285</sup> The SLJR calls for, among other things: (i) the enactment of appropriate legislative measures; (ii) proper sanctions being applied for corrupt behavior and conflicts of interest, (iii) judicial independence; (iv) improvements in the training of judges, prosecutors and court clerks; (v) the introduction of uniform court and case management procedures; (vi) increased budget allocations to the judicial system; (vii) the establishment of a commercial court; (viii) improvements in enforcement mechanisms and the execution of judgments; and (ix) improvements of the physical infrastructure of the courts along with proper information technology and equipment.

## **PART II**

### **CHAPTER IV:**

#### **ECONOMIC CONVERGENCE: POST 1991 -2007**

## **Chapter IV:**

### **Economic convergence: Post 1991 -2005**

#### **I. HISTORICAL FACTORS OF GROWTH:**

Far back in history, economic advances in income and population over the past millennium are sustained by three interactive processes: (i) Conquest or settlement of relatively empty areas which had fertile land, new biological resources, or a potential to accommodate transfers of population, crops and livestock; (ii) international trade and capital movements; and (iii) technological and institutional innovation.<sup>286</sup> The growth process was uneven in space as well as time. The rise in life expectation and income has been most rapid in Western Europe, North America, Australasia and Japan. By 1820, this group had forged ahead to an income level twice that in the rest of the world. By 1998, the gap was 7:1. By 2001 between the United States and Africa (the poorest region) the gap was 20:1 and still widening. In the case of Asia, divergence is dominant but not inexorable.

Since the 1950s most Third World countries have been independent for a quarter to a half of a century and the experience of economic development in these countries is varied and rich.<sup>287</sup> It is clear though that there are many paths to development although some no doubt are more circuitous than others.<sup>288</sup> Economic development for Third World countries could be stylized into six strategies, five of which apply to capitalist countries and one to the socialist countries.<sup>289</sup> The strategies can be viewed

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<sup>286</sup> For a convincing argument on the development of the entire world economy over the past two thousand years see Angus Maddison, above n 9.

<sup>287</sup> While the Post WWII era was the era of "embedded liberalism" for the advanced countries of Europe and the United States, the preoccupation for Third World countries was to cope with the pressures of nationalism and demands for decolonialization. Thus while the embedded liberalism regime, guaranteed by the Bretton Woods system, maintained a balance between openness, democracy, and economic fairness and operated to facilitate domestic politics and shield domestic systems of economic regulation and social protection from global shocks, the Third World countries placed emphasis on state-led growth and relatively closed markets. National movements seized control of states in former colonies and sought to break ties with their respective metropolises that had been built up under colonialism. Finally, there was the Cold War, and the ideological struggle with the Soviet Bloc. See David M. Trubek and Alvaro Santos, 'The New Law and Development', above n 41, 81-82.

<sup>288</sup> Maddison, above n 9, 142, 149, 161, 163.

<sup>289</sup> The six strategies are: (i) the Monetarist strategy, (ii) the Open Economy strategy, (iii) the Industrialization strategy, (iv) the Green Revolution strategy, (v) the Redistributive strategy of

as points along a multi-dimensional spectrum, two of the strategies occupying the extreme ends of the spectrum (monetarism, socialism) and the others intermediate points of particular interest. The countries are scattered along this multi-dimensional spectrum and some adopt positions close to one or another of the six selected points.<sup>290</sup>

The most successful strategy of development as regards resource utilization and the level of income is the open economy which has the virtues of relying on the price mechanism (and hence benefiting from allocative efficiency), of being exposed to international competition (and hence being under continuous pressure to cut costs and improve quality) and of using exports as a leading sector (and in this way being able to ensure adequate aggregate demand). The open economy also has an advantage over some of the other strategies of development in being in a good position to exploit economies of large-scale production and opportunities for intra-industry specialization.<sup>291</sup> Rapid and sustained growth in international trade has long been a hallmark of successful growth and development strategies in East Asia. Some success stories are well known: those of the newly industrializing economies such as Singapore, the Republic of Korea, as well as middle-income economies such as Thailand, Malaysia and the transition economy of China.<sup>292</sup> More recent entrants to world markets who have seen rapid export growth include low-income economies such as Cambodia and Vietnam.<sup>293</sup>

As regards savings, investment and growth, in the short run there is little reason to choose one of the five strategies in preference to another, but in the long run a country with an open economy probably has an advantage. One reason for this is that it will

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development, and (vi) the Socialist strategies of development. For a detailed analysis see Keith Griffin, *Alternative Strategies for Economic Development* (1999) ch 2.

<sup>290</sup> Ibid.

<sup>291</sup> Ibid 68-95.

<sup>292</sup> For Singapore, see Linda Low and Lim Bee Lum (eds), *Strategies of Singapore's Economic Success* (1997); Goh Keng Swee, *The economics of Modernization* (1995). For China, see Deepak Bhattachali, Shangton Li and Will Martin (eds), *China and the WTO: Accession, Policy Reform, and Poverty Reduction Strategies* (2004); Jonathan Story, *China and the Race to the Market* (2003); Kathie Krumm and Homi Kharas (eds), 'East Asia Integrates', above n 17. For Thailand see Pasuk Phongpaichit and Chris Baker, *Thailand: Economy and Politics* (1995); Yoshihara Kunio, *The Nation and Economic Growth: Korea and Thailand* (1999).

<sup>293</sup> Kathie Krumm and Homi Kharas (eds), 'East Asia Integrates', above n 17.

have less difficulty servicing foreign loans. A second reason is that foreign investors will in principle be able to produce either for the domestic or for the export market and thus they will derive potential benefits from an option that is denied them by countries pursuing a more inward-oriented strategy.<sup>294</sup> Once again, similar advantages are likely to be enjoyed by countries following an industrialization strategy oriented towards exports.<sup>295</sup>

At the end of the other spectrum, recent history has labeled the overall performance of the socialist economic system as the story of a failure. While sometimes the system is credited for having brought an underdeveloped country like Russia out of backwardness, be it at very high material and human costs, the inefficiencies of the model became obvious as early as in the 1950s, triggering a 'treadmill' of reforms. By the middle of the 1970s an open crisis developed and led to final collapse.<sup>296</sup>

Circumscribing these various development strategies, three events in particular have had a significant impact on thinking about strategies for economic development in the last half century.<sup>297</sup> First, a new approach to development problems has emerged - the human development approach - which has attracted much attention in academic circles and among international and national policymakers.<sup>298</sup> Indeed the human development approach has become the intellectual framework for much advice given by the United Nations Development Programme (UNDP) to developing countries. The UNDP has developed a 'human development index' which combines GDP per capita with health and education achievements in a single index to compare national trends. The 'HDI' is available from 1995 to 2003 for Cambodia and most other nations. The index closely shadows targets the government itself endorsed in the Millennium Development Goals (MDGs), so there can be no dispute that this is a reasonable basis for reviewing both economic and social progress. The index has the

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<sup>294</sup> For a thorough analysis on the effects of Foreign Direct Investment (FDI) on national economies see the annual publication *World Investment Report* series of the United Nations Conference on Trade and Development (UNCTAD).

<sup>295</sup> Griffin, above n 289, 232.

<sup>296</sup> For a thorough analysis of transition economies See Marie Lavigne, *The Economics of Transition: From Socialist Economy to Market Economy* (2nd ed, 1999)

<sup>297</sup> Griffin, above n 289, xv.

<sup>298</sup> Sen, above n 8.

advantage of going beyond the admittedly broad and rough single measure of real GDP per capita growth.<sup>299</sup>

*Second*, following the disintegration of the Soviet bloc in 1989-91 and the decision by almost all of the ex-socialist countries to adopt a market oriented economic system, there has been intense debate about how best to effect a transition from socialism to capitalism.<sup>300</sup> Following the decline of the 1960s statist import-substitution industrialization (ISI) paradigm, a new set of development policy prescriptions emerged from the Washington-based international financial institutions. This approach stressed export-led growth, free markets, privatization, and foreign investment as the keys to growth. To pursue these goals, it was necessary to create all the institutions of a market economy in former command economies and remove restrictions on markets in *dirigiste* economies such as those in many Latin American countries. Within the World Bank development policy models are situated in three different periods. The first period, that of "structural adjustment," goes from 1980 to 1990. The second period, which witnesses the emergence of "governance" runs from 1990 to 1999. The last period, from 1999 onward is one of "comprehensive development." These three periods attest to the changes in thinking about economic development. Broadly speaking, they encompass the rise and fall of neoliberal thinking, or the so-called Washington Consensus, and the subsequent move to an "enlightened" Washington Consensus, mediated by a decade of profound reforms and severe crisis.

*Third*, the spread of liberal economic policies in the developed countries, the creation of more open economies in the developing countries and the integration of the ex-socialist countries into the world economy has accelerated a process of globalization that began shortly after the end of the Second World War. This process of globalization has altered the context in which national development strategies are formulated and raises issues about the distribution of gains and losses associated with closer economic integration. There are a large number of literature on the effects of

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<sup>299</sup> See UNDP, *Human Development Report Series*.

<sup>300</sup> See David M. Trubek, 'Rule of Law in Development Assistance: Past, Present, and Future', above n 1, 84; See also Alvaro Santos, 'The World Bank's Uses of the "Rule of Law" Promise in Economic Development', above n 3, 267.



globalization. The following are quite representative of the diverse views: Joseph E. Stiglitz describes the many ways in which the major institutions of globalization have failed the struggling countries they were meant to serve;<sup>301</sup> Jagdish N. Bhagwati provides a precise rebuttal of the most common and pernicious fallacies about globalization;<sup>302</sup> Jan Aart Scholte explains succinctly the causes and consequences of globalization and moves beyond a critique of neoliberalism to identify realizable policy changes;<sup>303</sup> Amy Chua highlights on the tensions of the post-Cold War globalizing world and argues that as global markets open, ethnic conflict worsens and democracy in developing nations can turn ugly and violent. She presciently warns that, far from making the world a better and safer place, democracy and capitalism – at least in the raw, unrestrained form in which they are currently being exported – are intensifying ethnic resentment and global violence, with potentially catastrophic results;<sup>304</sup> Thomas L. Friedman explains how to look at today's globalization system, how the system works and how nation-states, communities, individuals, and the environment interact with the system. Foremost it reveals the conflict or tension between the globalization system and ancient forces of culture, geography, tradition, and community.<sup>305</sup>

## II. RECENT ASIAN EXPERIENCES OF GROWTH

### A. The Role of Policies in Economic Convergence

In recent history, resurgent Asian countries have demonstrated that an important degree of catch-up with their Western counterparts is feasible. In explaining their success, policy choices were pointed out interestingly enough to be the crucial element for achieving high growth rates and leading toward economic convergence.<sup>306</sup>

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<sup>301</sup> See Joseph E. Stiglitz, *Globalization and its Discontents* (2003).

<sup>302</sup> See Jagdish N. Bhagwati, *In Defense of Globalization* (2004).

<sup>303</sup> See Jan Aart Scholte, *Globalization: a critical introduction* (2002).

<sup>304</sup> See Amy Chua, *World on Fire* (2004).

<sup>305</sup> See Thomas L. Friedman, *The Lexus and the Olive Tree* (2000).

<sup>306</sup> Pistor, K. and Wellons, P.A., above n 70, 264. See also Asian Development Bank (ADB), *Emerging Asia: Changes and Challenges* (1997).

During the last fifty years, Asia has been the fastest growing part of the world economy outperforming all other regions. Resurgent Asia consists of 14 countries; seven of these have been the most dynamic element of the world economy.<sup>307</sup> The super growth countries had high investment ratios. They had a relatively high ratio of employment to population. They also had high rates of improvement in the quality of human capital. Equally striking was the rapid growth of exports and the high ratios of exports to GDP. Another element is the willingness of these countries to attract foreign direct investment as a vehicle for assimilation of foreign technology. In sum by their success in mobilizing and allocating resources efficiently and improving their human and physical capital to assimilate and adapt appropriate technology, the countries of resurgent Asia achieved significant catch-up on the advanced capitalist group.

The second group of Asian countries have on average much lower income levels than the first, lower investment rates, lower ratios of labour mobilization and less openness to international trade.<sup>308</sup> On the other end of the continuum, there are six Asian economies where economic performance since the 1950s to the end of the century has been considerably worse than the rest of Asia, and where income levels are relatively low.<sup>309</sup>

A key characteristics of the role of policy of the top seven Asian countries is the heterogenous nature of their policy mix. Few countries have followed a distinct strategy of development and those that have are distinguished from others by the coherent and internally consistent set of economic measures they have adopted to tackle an identifiable approach to their problems of development. Most countries, most of the time, are an assortment of borrowed bits and pieces from a number of different strategies, with incoherent and inconsistent development policies subject to the wind of political change. The strategies are stylized types and as far as any particular country is concerned, the strategy followed becomes apparent only after the event, i.e., it is revealed *ex post*. An economy's performance may be dominated by

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<sup>307</sup> The seven countries are: China (including Hong Kong), India, Malaysia, Singapore, South Korea, Taiwan, and Thailand.

<sup>308</sup> The second group of countries are: Bangladesh, Indonesia, Mongolia, Nepal, Pakistan, Philippines, and Sri Lanka.

<sup>309</sup> The six countries are: Afghanistan, Cambodia, Laos, Myanmar, North Korea, and Vietnam.

external or exogenous events that can neither be anticipated nor counteracted, and the failure of a strategy to produce the predicted results may reflect not a flaw in the strategy or the supporting theory, but a failure to implement the strategy fully and rigorously.

## **B.      *The Role of Trade in Economic Convergence***

At the heart of the globalization process, the role that trade is supposed to play in promoting growth and reducing poverty cannot be overemphasized.<sup>310</sup> It is argued for example that increased trade, promoted by liberalization policies, and undertaken as part of integrated packages that include macroeconomic and other structural reforms, leads to increased capital flows and acts as a powerful stimulus to economic growth, and that open trade regimes lead to higher rates of economic growth. Trade may facilitate international diffusion of knowledge and stimulate innovation, thereby speeding up growth by expanding the effective market size by producers.<sup>311</sup>

This experience led many countries to implement substantial trade policy reforms in the late 1970s and 1980s. Studies of the trade liberalization episodes in the 1970s support the conclusion that trade creates and sustains higher growth. Development literature abounds with studies that indicate the positive links between trade and development.<sup>312</sup> These experiences support those of many Asian countries, which have implemented substantial trade policy reforms in the late 1970s and 1980s. The so-called list of post 1980 globalizers includes China, India, Indonesia, Thailand,

<sup>310</sup> See, eg, The World Bank, *Globalization, Growth and Poverty: Building an Inclusive Economy* (2002); UK Government White Paper, *Eliminating World Poverty: Making Globalization Work for the Poor* (2000). The relation between trade liberalization (or market openness) and growth has been suggested in a paper that was first presented at an OECD conference in 1996 and inspired the World Bank report *From Plan to Market*. The bottom line is that liberalization is an essential engine of growth because it provokes the expansion of formerly repressed activities such as domestic trade, finance and business services, and exports to market economies, while it entails the contraction of 'overbuilt' sectors such as industry and in some cases agriculture; Andrew Berg and Anne Krueger, *Trade, Growth, and Poverty: A Selective Survey*, IMF Working Paper, WP/03/30, (2003).

<sup>311</sup> See, eg, ADB President Haruhiko Kuroda, 'Opening Remarks: Aid for Trade and the ADB Experience' (Speech delivered at the Ministerial Conference on Mobilizing Aid for Trade: Focus Asia and the Pacific, Manila, 19-20 September 2007); WTO Director General Pascal Lamy, 'Opening Remarks: Aid for Trade and the ADB Experience' (Speech delivered at the Ministerial Conference on Mobilizing Aid for Trade: Focus Asia and the Pacific, Manila, 19-20 September 2007). See also OECD, *Aid for Trade: Making It Effective* (2006).

<sup>312</sup> See also a critical assessment of the World Bank support for trade. Independent Evaluation Group (IEG), *Assessing World Bank Support for Trade 1987-2004: An IEG Evaluation* (2006) 245. For opposite views see Oxfam, *Rigged Rules and Double Standards: Trade, Globalization, and the Fight Against Poverty* (2002).

Vietnam, Bangladesh and Nepal. All these countries cut their tariffs and otherwise streamlined their trade regimes.<sup>313</sup> All have had large increases in trade and most have had large increases in foreign investment as well.<sup>314</sup> As a sub region, East and South-East Asia is experiencing impressive growth in trade and investment and becoming a dominant part of international production networks and supply chains. Between 1995-2004 East and South-East Asia experienced more rapid growth in trade (both imports and exports) than the world economy during the same period.<sup>315</sup> South Asia has enjoyed robust annual growth rates consistently averaging more than 7.5 % in recent years with India leading as the largest economy in the region. Intra-Asian trade has increased at the same pace as trade with the world implying the growing dynamism of regional trade and investment.<sup>316</sup>

Trade liberalization in Asia has taken place at different levels. At the multilateral level, all countries have acceded to the WTO or have started accession negotiations. At the regional level, there has been a flurry of regional and bilateral Free Trade Agreements (FTA) indicating an increasing trend towards the deepening of economic cooperation between and within the existing regional groupings.<sup>317</sup>

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<sup>313</sup> On Laos see Kim Anderson, *Lao Economic Reform and WTO Accession* (1999); World Bank, *Building Export Competitiveness in Laos: Background Report* (2006). For Nepal see Government of Nepal, *Nepal Trade and Competitiveness Study: A Study conducted as part of the Integrated Framework for Trade-Related Technical Assistance* (2004). For Vietnam see UNDP MPI/DSI, *Globalization and International Economic Integration: Assistance for the preparation of the Socio-Economic Development Strategy for Viet Nam 2001-2010* (2001). For China see previously cited Deepak Bhattasali, Shantong Li and Will Marin (eds), *China and the WTO: Accession, Policy Reform, and Poverty Reduction Strategies* (2004).

<sup>314</sup> See UNCTAD, *World Investment Report 2006: FDI from Developing and Transition Economies: Implications for Development* (2006).

<sup>315</sup> See, eg, ADB, *Outlook 2007* (2007) 30, 39; ADB, 'Background Paper on the Greater Mekong Subregion' (Paper presented at the Ministerial Conference on Mobilizing Aid for Trade: Focus Asia and the Pacific, Manila, 19-20 September 2007); ADB, 'Background Paper for South Asia' (Paper presented at the Ministerial Conference on Mobilizing Aid for Trade: Focus Asia and the Pacific, Manila, 19-20 September 2007).

<sup>316</sup> See International Trade Center UNCTAD/WTO, *Consolidated Programme Document (2008-2009): Vol. IV Strategy for Asia and the Pacific* (2007) 4, 12.

<sup>317</sup> Krumm and Kharas, above n 17, 79-99; see also Dominique van der Mensbrugghe, Richard Newfarmer and Martha Denisse Pierola, 'Regionalism vs. Multilateralism' in Richard Newfarmer (ed), *Trade, Doha, and Development: A Window into the Issues* (2006) 309-311; See ADB, *Regional Cooperation Strategy* (2006) 29.

### C. The Role of Aid in Economic Convergence

Since the "development aid" movement was launched fifty years ago, debates hinged on whether or not aid itself contributes to development.<sup>318</sup> Growth has been slow in many of the poorest aid recipients, and in Sub-Saharan Africa the share of the population living on less than a dollar a day stagnated during the 1990s, contributing to a growing perception that aid flows have failed to support development. Nonetheless, foreign aid has played a prominent role in the successful development of several Asian countries. It helped these newly independent nations to stabilize their economies, rebuild or add to physical and social infrastructure, and import inputs vital to getting their economies moving forward. It was essential to the initiation of a process of non-inflationary economic growth and an atmosphere conducive to adoption of appropriate policies. Aid was also perceived as a positive force in helping to motivate domestic efforts to improve organizational and policymaking capabilities.<sup>319</sup>

The growing consensus on how to improve donor policies has its roots in the mixed success of efforts to help developing countries recover from the failure of many economic policies of the 1970s and 1980s.<sup>320</sup> Growth in many developing countries was depressed by unsustainable macroeconomic policies, financial repression, high trade barriers, pervasive state interventions in competitive markets and complex administrative constraints on entrepreneurial activity. Donor programs during the late 1980s and throughout the 1990s thus increasingly focused on supporting efforts at providing an economic policy environment conducive to growth and development. The efforts included also a major shift in the balance of aid away from providing

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<sup>318</sup> Burnside and Dollar's econometric analysis led to somewhat pessimistic conclusions about how much difference foreign assistance had made in the developing world: "Consistent with other authors, we found that on average aid has had little impact on growth. . . ." But the paper also had an optimistic aspect, and consequently their article was widely cited for their additional conclusion that aid can make a difference in countries that follow good policies. See Burnside and Dollar, 'Aid, Policies, and Growth' (2000) *American Economic Review* 90 (4) 847-68.

<sup>319</sup> For more on developing capacity, see Sakiko Fukuda-Parr, Carlos Lopes and Khalid Malik (eds), *Capacity for Development: New Solutions to Old Problems* (2002).

<sup>320</sup> Many developing and transition countries that had adopted the neoliberal policies experienced severe economic crises. When it became clear that policies were not delivering the growth that had been promised, the voices of skeptical economists became louder, and confidence in the so-called Washington Consensus that codified neoliberal policies began to erode. See David M. Trubek and Alvaro Santos (eds), above n 41, 6.

finance to governments and towards support for the private sector.<sup>321</sup> Nonetheless, many countries have achieved impressive growth rates with the support of aid flows, and since 1990 the share of people living in extreme poverty in developing countries has dropped from 29 percent to 23 percent, led by rapid progress in India and China.

Recent years have witnessed a new trend where there is a growing consensus that development aid is most effective when it is channeled to countries with good policies and effective institutions.<sup>322</sup> In fact, donors, both bilateral and multilateral, are moving toward systems that allocate aid based on country performance characteristics.<sup>323</sup> The 2005 World Development report found that assistance provided by major bilateral and multilateral development agencies for investment climate improvements averaged USD 21 billion per year between 1998 and 2002 - or about 26% of all development assistance.<sup>324</sup>

The development experiences of resurgent Asian countries have shown a shift toward outward-looking development strategies during the transition they had to make from reliance on foreign aid to growth sustained by domestic saving. Export promotion policies were adopted in order to overcome foreign exchange scarcities and to ensure their ability to service debts. The phenomenal success of export promotion in labor intensive manufacturing led to full employment, an egalitarian distribution of income, and higher domestic saving. In sum, foreign aid played a catalytic role in pushing policies in the right direction and contributing a number of valuable resources to the development effort.<sup>325</sup>

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<sup>321</sup> A new consensus, which emerged during the 1990s in most of the developing world, is founded on the massive evidence that state-sponsored models of economic development have given poor results in the short and long terms. Reacting to the statist failures of the past, the current paradigm gives private sectors in developing countries a more active and powerful role. The state is perceived to be in urgent need of improving its institutional capacity to facilitate the participation of the private sector in economic development. See Edgardo Buscaglia and William Ratliff, above n 19; World Bank, *World Development Report* (1997).

<sup>322</sup> Burnside and Dollar, above n 318.

<sup>323</sup> For example, the World Bank's Country Policy and Institutional Assessment (CPIA) is used to allocate concessional resources to low income countries, while the US Government has established a Millennium Challenge Account (MCA) for countries that 'govern right,' invest in people' and 'promote economic freedom.'

<sup>324</sup> See, eg, World Bank and OECD, *Enhancing private investment for development: Policy guidance for development agencies* (2004); World Bank, *World Development Report 2005: A Better Investment Climate for Everyone* (2004).

<sup>325</sup> Emerging East Asian economies have seen their share of world exports more than triple in the past quarter-century, from 5.4 percent in 1975 to 18.7 percent in 2001. See Krumm and Kharas, above n

## II. CAMBODIA'S GROWTH EXPERIENCE

### A. *A Case of Economic Convergence*

The Cambodian experiences have revealed over the last half century the crucial role of policy choices. Cambodia witnessed huge swings in economic policies, the dramatic ones occurring during the period of genocidal Khmer Rouge regime. Since the seventies, economic advance in Cambodia was seriously interrupted by war, genocide, and exposure to a lengthy period of communism. Two decades of isolation and conflict devastated much of the country's physical, social and human capital, forcing the nation to start from scratch in rebuilding its infrastructure and institutions. With the United Nations supervised peace process of 1991-93 Cambodia got a respite and had since made some significant comebacks as compared to the pre-war era.

Cambodia's transition to a market economy was painfully slow and hampered by several constraining factors including difficult initial conditions, an unfavorable demography, and weak resources. The overall economic landscape suffered from a host of factors such as inherent weaknesses within the country's economy and institutions, low technological application, limited human resources, low resource base for investment, poor standard of living and weak social and economic structures.<sup>326</sup> Poverty rates were very high with around 35-40 percent of the population living below the poverty line, and 15-20 percent in extreme poverty.<sup>327</sup>

Despite inherent deficiencies the Cambodian development experience has shown some similar, though not as successful, patterns of economic convergence with many resurgent Asian countries. Cambodia's economic convergence was, arguably, largely attained by good initial policy choices supported, to a larger extent, by external aid.

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17, 1. For a historical perspective and a critical analysis of foreign aid to the developing world, see William Ryrie, *First World, Third World* (1999).

<sup>326</sup> See, eg, UNDP, *Kampuchea Needs Assessment Study* (1989); World Bank, *Cambodia: From Rehabilitation to Reconstruction*, above n 57; Ayres, above n 38, 157.

<sup>327</sup> See, eg, World Bank, *Cambodia: Rehabilitation Program: Implementation and Outlook*, above n 58; World Bank, *Cambodia: From Recovery to Sustained Development* (1996); UNDP, *Human Development Report* (1995).

These policy choices affected several dimensions: economic openness - international trade, investment regime, privatization measures, and private sector development. Geopolitics and domestic politics were the driving forces or motives behind these policy shifts or reforms. Positive links between trade and development supports those of many Asian countries which have implemented substantial trade policy reforms in the late 1970s and 1980s.

Cambodia's performance for the period 1970-2003 against a number of factors that have been positively associated with growth.<sup>328</sup> Despite Cambodia's difficult initial conditions in 1970s leading to the early 1990s, Cambodia's growth performance has been amongst the best in the past decade. From 1994 to 2006, annual GDP grew on average by 8.4 percent, reflecting both external factors and good macroeconomic policies. GDP per Capita climbed from below USD 200 in 1994 to USD 512 in 2006. Cambodia's growth performance continues to be particularly strong and on overall macroeconomic management Cambodia has also continued to outperform other low income economies (see table 4.1).<sup>329</sup> The 2005 Human Development Index (HDI) for Cambodia shows a 0.598, which gives the country a rank of 131<sup>st</sup> out of 177 countries as compared to an index of 0.337, and a country ranking of 153rd out of 173 countries in 1992.<sup>330</sup>

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<sup>328</sup> IMF, *2004 Article IV Consultation Selected Issues Cambodia (Staff Report prepared for the Members of the Executive Board Discussion*, Washington DC, 30 August 2004).

<sup>329</sup> Ibid.

<sup>330</sup> It would be reasonable to hypothesize that Cambodia would enjoy especially fast HDI improvements over this period since it followed the establishment of peace and the beginning of fast growth and considerable foreign assistance. It is also true that those starting with a lower HDI tend to move up faster and this also favors rapid progress. The global country rating can be found at the following website <[http://hdrstats.undp.org/countries/country\\_fact\\_sheets/cty\\_fs\\_KHM.html](http://hdrstats.undp.org/countries/country_fact_sheets/cty_fs_KHM.html)> at 30 June 2008. See also UNDP, *Cambodia Human Development Report- Expanding Choices for Rural People* (2007); World Bank, *Cambodia: Sharing Growth, Equity and Development Report*, above n 113.



**Table 4.1**

Table 1. Real GDP Per Capita Growth <sup>1</sup> (Annual average, in percent)		
	1970-2003	1999-2003
All (144)	1.5	2.2
PRGF (70)	1.0	1.9
LIC-Non-Fuel (68)	1.0	1.9
Asia (23)	2.8	1.9
Asia excluding China (22)	2.6	1.8
Asia excluding islands (18)	3.1	2.3
ASIA-LIC (15)	2.4	1.9
Transition (29)	2.1	3.7
Transition LIC (13)	1.5	3.6
ASEAN (9)	3.4	2.9
ASEAN LIC (4)	3.1	3.3
<b>Cambodia</b>	<b>3.5</b>	<b>2.6</b>
Laos, PDR	2.9	5.4
Vietnam	3.7	2.2
Source: WEO database.		
<sup>1</sup> Excludes advanced economies. Asia and ASEAN exclude Brunei Darussalam.		

Source: IMF Country Report No. 07/290 (2007)

The recent decision in 2006 by the IMF to relieve Cambodia of US\$ 82 million in debt — based on its macroeconomic performance, poverty reduction strategy, and public expenditure management system — confirms the satisfactory progress made by the government to manage its economy, and in particular for the first time in history, to boost its revenues over the past few years to almost 12 percent of GDP.<sup>331</sup>

This growth performance is significantly higher than the average for all developing countries and for low income countries (LICs). Cambodia's pace of growth is more similar to that of other ASEAN low income countries and of transition countries. Like its immediate neighbors, Laos and Vietnam, Cambodia has made nonetheless a more successful transition than the successor states of the USSR.

<sup>331</sup> As part of the Multilateral Debt Relief Initiative the IMF Executive Board on 5 January 2006 approved relief on 100 percent of debt incurred by Cambodia to the IMF before 1 January 2005. This resulted in all Cambodia's outstanding debt to the IMF, a total of SDR 56.8 million (about US\$82 million) being forgiven. See IMF Representative, 'Remarks on Macroeconomic Developments in 2005' (Speech made at the 8<sup>th</sup> Consultative Group Meeting, Phnom Penh, 2-3 March 2006). See also Ministry of Economy and Finance, *Public Financial Management Reform Program: Strengthening Governance in Cambodia through Enhanced Public Financial Management* (2004).

In term of economic liberalization, Cambodia has one of the most open economies in the developing world and the South East Asian region. The Index of Economic Freedom ranks Cambodia 68<sup>th</sup> among 170 countries in 2006.<sup>332</sup> This is on par with Malaysia and ahead of its neighbors (Thailand 71<sup>st</sup>, Indonesia 134<sup>th</sup>, and Vietnam 142<sup>nd</sup>). Among the LDCs, Cambodia ranked 4<sup>th</sup> highest in the Index.

The pattern of growth in Cambodia is consistent with historical development patterns in all developing countries, including today's developed countries. Favorable external conditions, including foreign aid flows and trade agreements, have helped propel recent growth.<sup>333</sup> The rapid growth of garments, in particular, has been a plus for export income and non-farm employment generation - both direct and indirect. There are a number of factors underlying this performance: The economic boom in the countries around Cambodia from the late 1980s to mid-1997 was one of the major external factors fostering Cambodia's transition to a market economy, reconstruction and development. Thailand and Singapore have absorbed a large proportion of Cambodia's exports since the establishment of a coalition government in 1993. Foreign direct investment (FDI) from Malaysia, Thailand, Singapore, and recently China and South Korea, also helped supplement the shortage of domestic savings, investment and human resources in Cambodia.<sup>334</sup>

Garment exports have remained strong, in large part owing to the breathing room created by the imposition of safeguards measures by the United States on imports from China, as well as China's bilateral agreement with the European Union to restrain Chinese exports. Tourism has continued to expand,<sup>335</sup> and agriculture and fisheries output rebounded very strongly. Finally, prudent monetary policy implementation and a deepening of financial intermediation by the banking system has continued to support the expansion of domestic economic activity.<sup>336</sup> The

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<sup>332</sup> In the 2007 Index of Economic Freedom, Cambodia's ranking fell from the previous year (from 68th to 102nd), due in significant part to its very low score with respect to "Freedom from Corruption." Cambodia still rated higher than Indonesia, Vietnam, and Laos. See Heritage Foundation, *Index of Economic Freedom* (2007).

<sup>333</sup> IMF, above n 328, 3.

<sup>334</sup> See Chapter II, 67-71 for an analysis of FDI periods and inflows to Cambodia.

<sup>335</sup> See, eg, Prasso, above n 143; Cat Barton, 'Tourism industry set for high season boom', *Business Times* (Phnom Penh) 19 Nov 2007.

<sup>336</sup> In the past decade, microfinance has transformed Cambodia's young and undeveloped finance

Cambodian government welcomed its first-ever foreign currency and local currency government bond ratings from Moody's and from Standard & Poor's.<sup>337</sup> The Cambodians are resuming their confidence in the country's banking industry, as deposits and accounts increased in 2006.<sup>338</sup> Total deposits in the country's banking system grew by 40 percent in 2006 over 2005, with the number of accounts rising to nearly 300,000.<sup>339</sup> Small businesses previously operating in the informal sector are increasingly registering and seeking bank finance, with vigorous construction activity reflecting a broadening of investment demand for real estate and a vibrant urban economy.<sup>340</sup>

Other internal growth factors included important progress in ensuring peace and security, rebuilding institutions, and considerable improvements in road infrastructure, power and water supply reliability, airport terminals, and expansion in telephony network. External supporting factors included acceptance into the international community through the WTO accession, security in the sub-region, an absence of economic crisis, signs of growth in all major markets, and increasing partnership among donors.

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sector and, in the process, provided important financial services to small businesses, reaching almost a fifth of all Cambodian households. For example the Association of Cambodian Local Economic Development Agencies (ACLEDA) Bank has grown from a small NGO in the 1990s into the country's second-largest bank, reaching 181,000 people through 166 branches in all 24 provinces.

<sup>337</sup> See 'Cambodia's first-ever Moody's ratings', *dpa* (Phnom Penh). <[http://www.forbes.com/2007/05/22/cambodia-moodys-ratings-markets-bonds-cx\\_vk\\_0522markets08\\_print.html](http://www.forbes.com/2007/05/22/cambodia-moodys-ratings-markets-bonds-cx_vk_0522markets08_print.html)> at 30 June 2008.

<sup>338</sup> Three national microfinance institutions received awards for their financial transparency in an international competition organized by a consulting body of the World Bank. Acleda, Angkor Microfinance Kampuchea and Prasak are among the five leading microfinance establishment selected for the competition among 175 countries. See 'Microfinance institutions awarded for transparency', *Development Weekly* (Phnom Penh) 12 - 18 June 2006.

<sup>339</sup> See, 'Public confidence in Cambodia's banking industry picks up', *Xinhua*. <<http://english.people.com.cn/90001/90778/6215367.html>> at 30 June 2008.

<sup>340</sup> See, eg, 'Market for new houses flourishes in Phnom Penh', *The Weekly Business Press Review* (Phnom Penh) 11 - 17 October 2004, 5; Cat Barton, 'A major hotel building boom has also greatly increased the number of hotel rooms available', *Business Times* (Phnom Penh) 19 Nov 2007. According to the Ministry of Tourism, at the end of 2006 Phnom Penh had more than 9,500 rooms, including 137 hotels with a total 7,068 rooms and 197 guest houses with a total of 2,506 rooms. Siem Reap had more than 9,000 rooms including 91 hotels with a total 6,638 rooms, and 171 guest houses with a total of 2,384 rooms.

## **B.      *Role of Policy Choices in Economic Convergence***

The Cambodian experiences have revealed that its economic convergence in recent years was the direct result of appropriate policy choices and strategies for development. Historically in term of strategy for development the Cambodian experience, since its independence half of a century ago, seems to support similar experiences of other resurgent Asian countries, that of a mix of various development strategies. Evidence reveals a huge swing in economic policies over the covered periods. Cambodia made fundamental shifts in economic policies during the post-Independence period (1954 -1975).<sup>341</sup> During the French protectorate period, from 1863 to 1954, Cambodia was seen as a provider of raw materials and a buyer of finished products. From 1955 to the end of 1969, the industrialisation process began and Cambodia enjoyed a peaceful period of steady economic growth and security. In the late 1960s, a failed nationalization policy forced a massive corporate exodus and seriously disrupted the development of Cambodia's market economy. The period 1970–75 was plagued by a civil war that brought development to a halt. The 1975-79 period witnessed a Maoist communist system based on ultracollectivism which, combined with the imposition of a complete trade embargo by the United States, brought Cambodia to Year Zero. The post genocidal regime (1979-1990) brought back to life early market-oriented reforms and recognition of basic property rights.

The Paris Peace Accord of 1991 and subsequent period finally paved the way for the transition toward the development of a democratic political system and a liberal market economy and the country's renewed access to international financial assistance.<sup>342</sup> Since, the government policies have been unequivocally unambiguous with regards to economic integration and economic liberalization.<sup>343</sup> It recognized that

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<sup>341</sup> See Chapter II for the main economic development during the various policy periods.

<sup>342</sup> The official commitment to development did not emerge in isolation. In parallel with its role in promoting the emergence of a modern state in Cambodia, the international community played a substantial role in imposing on Cambodia's government an ideology in harmony with the imperatives of the New World Order (NWO) that emerged in the aftermath of the end of the Cold War. Developmentalism in Cambodia embodies the aim of the "rejuvenated" modernization model to integrate into the global capitalist economy the nations and, therefore, the markets of the developing world. See David M. Ayres, above n 38, 162.

<sup>343</sup> Cambodia's first steps on the path toward modernization, and therefore reintegration into the global capitalist economy, were taken in June 1992, when Japan hosted the Ministerial Conference on the Rehabilitation and Reconstruction of Cambodia (MCRRC). The principal accomplishment of the conference was the establishment of the International Committee on the Reconstruction of

Cambodia's development potential can best be realized within the framework of external sector policies that are outward looking with trade and liberalization policies acting as a powerful stimulus in promoting growth and reducing poverty. Cambodia's general trade policy can be best described as an all out multi-tracks policy directed at an effective integration of the country into the world economy with accession to the WTO as marking the final step in bringing Cambodia back into the global trading system. Regionally, Cambodia acknowledged the dynamism of the Asia Pacific region in which it is situated and has pursued aggressively regional and bilateral opportunities to complement its multilateralism approach. Its policy was designed to capitalize on the country's least-developed country (LDC) status with the greatest part of Cambodia's exports benefiting from various systems of trade preference such as the Generalized System of Preferences (GSP), the EU's "Everything but Arms" and the ASEAN Integration System of Preferences (AISP).<sup>344</sup>

The following six key policy instruments were developed, readjusted and refined over the past decade to bring about the economic convergence that is witnessed today:

- a) The National Programme to Rehabilitate and Develop Cambodia (1994 NPRD and 1995 Implementing NPRD), one of the key thrusts of the first post UNTAC policy document, initiates the process of reintegration of the Cambodian economy into the regional and world economies, through the gradual opening of the country to international trade and private foreign investment.
- b) The Socio-Economic Development Plan (SEDP II 2000-05), Cambodia's first 5 years plan ever conceived, pronounces in particular the government's commitment to fight poverty through the fostering of a broad based-sustainable economic growth, with the private sector playing the leading role.
- c) The Government Platform for the Second Term (1998-2003) commonly referred to as the Triangle Strategy calls for Cambodia's integration into the region and normalization of its relationships with the international community, thus allowing

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Cambodia (ICORC), a consultative body and international mechanism whose members comprised countries and organizations contributing to Cambodia's development. Ibid. 163.

<sup>344</sup> See Chapter II, page 61-66 for the various trade preferential schemes.

Cambodia to attract more foreign assistance and FDI to support the country's ultimate objectives of development.

d) The National Poverty Reduction Strategy (NPRS 2003-05) adopts a comprehensive framework for poverty reduction at the core of which are measures to maintain macroeconomic stability, shift resources to more efficient sectors, and promote integration within the global economy.

e) The 2004 Rectangular Strategy (RS), an expansion of the Triangle Strategy, commits to broaden the base of growth by strengthening governance to attract investment, and ensuring competitiveness.

f) The National Strategic Development Program 2006 -10 (NSDP) focuses on broadening growth, particularly in rural areas and providing a good road map for tackling poverty. The NSDP, which constitutes the Government's second poverty reduction strategy, guides the implementation of the vision laid out in the Government's Rectangular Strategy (RS) and the Cambodian MDGs.

g) The Cambodia Trade Integration Strategy (2007) commits Cambodia to go further in identifying the connections between trade development and poverty reduction, and promoting policies that redistribute the benefits of trade throughout Cambodian society. More specifically it identifies 19 goods and service sectors that provide strong opportunities for Cambodia to build a more diversified export sector.

### **C. *Role of Economic Strategies***

In retrospect, the Cambodian post peace experience reflects *ex post* an outward-looking strategy of development (Open Economy strategy) which relies on market forces to allocate resources and on the private sector to play a prominent role.<sup>345</sup> The basic backbone of Cambodia recent economic growth can be attributed to

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<sup>345</sup> More than a decade after the Paris Peace Accords, Prime Minister Hun Sen acknowledged that Cambodia is determined to follow a 'Look East' policy and use Japan as a model for economic development as Malaysia has. Mahathir Mohamad, prime minister of Malaysia from 1981 to 2003, speaking at the opening ceremony of the Cambodia-Japan Cooperation Center, explained that he guided Malaysia's own 'Look East' policy, which focused on Japan and allowed Malaysia, an agricultural country, to develop into the industrial economy it is now. From the lessons the most

the role of trade and development assistance. Cambodia's economic performance was to a great extent dominated by external or exogenous events that can't be anticipated. The inflow of FDI in the garment industries and its record success in export came about fortuitously with the advent of the WTO and its textile quota system combined with Cambodia's subsequent market access to the US and EU.<sup>346</sup> During that time Cambodian policymakers had never envisaged that to keep that industry alive and competitive they would have to take, in a not so distant future, a highly controversial policy decision in term of linking the export of garment with the respect of labor conditions. After five excruciating years of implementation and coinciding with the end of the textiles quota system, Cambodia emerged as a clear winner and a much sought after model of a country which was able to nation brand itself as a 'safe sourcing country for the textiles and apparel sector'.<sup>347</sup>

Paradoxically, despite clearly articulated strategy and policy statements to attract FDI – often times amended and refined over the years - and supported by detailed laws and regulations the Cambodian experiences has painfully highlighted that the failure of a strategy to produce the predicted results may reflect not a flaw in the strategy or the supporting theory, but a failure to implement the strategy fully and rigorously.

The performance of FDI is a good case in point. After a few successful years, FDI has declined progressively reflecting a loss of confidence in Cambodia since 1997. Clearly the Asian financial crisis, which occurred in mid-1997, has had a dramatic impact on investment but these economies have fully recovered since. More so, investors perceived the prospects for a better investment environment in Cambodia as weak, with key governance and judicial reforms progressing too slow. Business people often cited corruption as the main constraints to investment in Cambodia.<sup>348</sup> In sum, Cambodia's weak FDI performance could be largely attributed to its inability to

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important ingredients for sustainable development can be discerned: appropriate policies to abolish trade imbalances, high rate of savings, investment in human resources and physical infrastructures, and efficient government. See *Development Weekly* (Phnom Penh) 20 - 26 February 2006.

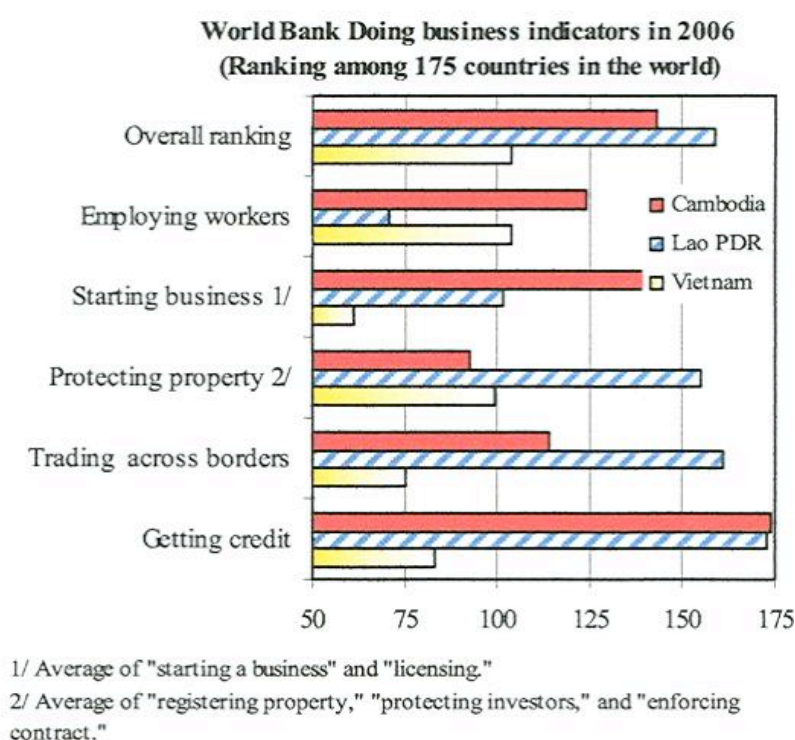
<sup>346</sup> Because Cambodia was a latecomer to the apparel industry, it was not a party to that system and therefore had no quotas. It was free to sell into the U.S. and EU markets, but at the same time those countries were free to limit or cut off market access at will, in the absence of negotiated agreements.

<sup>347</sup> See previously quoted Polaski, above n 65, and Abrami, above n 65.

<sup>348</sup> World Bank, *Cambodia Governance and Corruption Diagnostic: Evidence from Citizen, Enterprise and Public Official Surveys*, above n 136.

respond to the challenges in converting sound policies and market access opportunities into a credible investment climate (See Table 4.2: World Bank Doing Business indicators in 2006). Instead issues of economic governance were clearly the critical factors in deterring private investment and reducing Cambodia's competitiveness. Aside from the new found oil and gas Cambodia has not succeeded to date in broadening the base of economic opportunities through diversification in other potential rich sector such as agro-industries.

**Table 4.2:**



Source: IMF Country Report No. 07/290 (2007)



#### **D. The Role of Aid in the Economic Development of Cambodia**

The Cambodian experience has also highlighted the positive contribution of development assistance in convergence with the experiences of other resurgent Asian countries. Cambodia's effort to reconstruct an economy that had been ruined by almost three decades of civil strife was supported by a United Nations sponsored peace agreement and large inflows of international assistance in the early 1990s. Aid flows have played not only a critical role in helping Cambodia rebuild the basic economic system, but also, to some extent due to the substantial depletion of human capital, helping the government run the country.<sup>349</sup> Aid flows were critical in supplementing investment in education, health, and basic infrastructure.<sup>350</sup> External financial assistance to Cambodia was significantly higher than to other low income countries.<sup>351</sup> Between 1992 and 2006, Cambodia received about US\$6 billion in external assistance, equivalent to an average of about 13 percent of GDP annually.<sup>352</sup> At the 2006 Consultative Group meeting, development partners pledged US\$ 601 million in support for Cambodia's development efforts, representing a significant increase over pledges for 2005.<sup>353</sup> Cambodia's international donors pledged \$690 million in aid for 2007, a 15 percent increase on the previous year.<sup>354</sup> In recent years emerging donors like China and Korea are playing a more prominent role.<sup>355</sup> The increase in pledges reflected the donors' trend with respect to the linkage of aid increase to the policy and institutional performance of the country. The recent decision by the IMF to relieve

<sup>349</sup> The genocide under the Khmer Rouge rule substantially depleted the country's human capital. While returning Cambodians from abroad have partially filled the gap, a large amount of foreign experts were needed to fill the remaining gap. Moreover, the near absence of institutions, including a legal structure, required a large amount of foreign technical assistance in drafting laws, especially for WTO accession, and establishing basic procedures of *modus operandi*.

<sup>350</sup> See, eg, Per Ronnas, *From Emergency Relief to Development Assistance: How Can Sweden Best Help Cambodia* (1995); M. Godfrey et al., *Technical Assistance and Capacity Development in an Aid-Dependent Economy* (2002).

<sup>351</sup> Cambodia is one of the largest recipients of aid flows among the neighboring Asian countries, along with Lao P.D.R., Bhutan, and Mongolia. In terms of concessionality of loans, Cambodia has received the lowest average interest charges among the countries. See IMF, above n 328, 61.

<sup>352</sup> For additional details of Cambodian ODA see the website of the Council for the Development of Cambodia. <<http://www.cdc-crdb.gov.kh>> at 30 June 2008.

<sup>353</sup> Ian C. Porter, Concluding Remarks of the Co-Chairman (Speech made at the 8<sup>th</sup> Consultative Group Meeting, Phnom Penh, 2-3 March 2006).

<sup>354</sup> Ek Madra, 'Cambodia donors pledge \$690 mln in 2007 aid', *Reuters* (Phnom Penh) 20 June 2007, 1. <<http://www.alertnet.org/thenews/newsdesk/BKK259511.htm>> at 30 June 2008.

<sup>355</sup> Ibid. A breakdown revealed that much of the increase was accounted for by \$91 million from China, a country which has shunned the collective donor process in previous years, preferring to offer bilateral assistance instead. Japan remained the biggest contributor, with \$112 million.

Cambodia of US\$ 82 million in debt confirmed such a trend.<sup>356</sup>

About 80 percent of total external financial support was in the form of grants, although the composition changed toward loans in recent years. It is estimated that during the same period Cambodia borrowed about \$600 million on concessional terms mainly from the World Bank and the Asian Development Bank.<sup>357</sup>

Most foreign assistance (53 percent) went to economic development, such as road construction, power and water supply rehabilitation. Social development accounted for 41 percent, and was mostly executed by NGOs.<sup>358</sup> The rest of foreign aid (6 percent) went to general administration, mainly through foreign experts appointed to advise different ministries or public institutions, and working on structural adjustment programmes.<sup>359</sup> The presence of foreign expertise mostly from the West and advanced Asian countries has played a dominant role in shaping the course of policies drafting and implementation.<sup>360</sup>

<sup>356</sup> IMF Representative, 'Remarks on Macroeconomic Developments in 2005', above n 331.

<sup>357</sup> Jeffrey Sachs, a special adviser to UN Secretary-General Kofi Annan and head of the UN Millennium Project said Cambodia has not done enough to meet its UN Millennium Development Goals and needs about US\$1 billion in international aid to curb poverty. He said developed countries must support developing countries' efforts to reach the goals by increasing aid and canceling debt. However, he warned more aid should be given in the form of grants rather than loans. Sachs also suggested Cambodia should improve its aid management to achieve better outcomes. See 'UN economist: Cambodia needs more aid to reach development goals', *Development Weekly* (Phnom Penh) 15 – 21 August 2005.

<sup>358</sup> 'Cambodia laden with NGOs', *Development Weekly* (Phnom Penh) 23– 29 August 2004. Nearly 1,500 NGOs and associations have been registered in Cambodia in the past 10 years. See also Sabine Trannin, *Western NGOs in Cambodia, The Reality Behind the Myth* (2005) [trans of: *Les ONG Occidentales au Cambodge, la Réalité Derrière le Mythe*]. Trannin highlights the involvement of some Western NGOs in politics and business, as well as the role they play in making Cambodia an "assisted" country. This mode of delivery is not surprising for a post crisis like Cambodia, in the case of Rwanda 75 percent of donor support went directly to NGOs or directly managed by the donors through their own projects. See Stephano Curto, 'Changing Aid Landscape' (2007) 44 (4) *Finance and Development* 4.

<sup>359</sup> Cambodia spends approximately USD 37 million annually to pay the salaries of about 740 foreign consultants. The claim was based on a United Nations Development Programme. The amount represent 50 percent of the yearly payment of 165,000 government officials. See 'Foreign experts cost USD 37 million per year', *Development Weekly* (Phnom Penh) 14 – 20 March 2005.

<sup>360</sup> The following key policy instruments bear deep imprints of foreign expertise: (i) the National Programme to Rehabilitate and Develop Cambodia (1994 NPRD and 1995 Implementing NPRD). The UNDP was the main driver behind the strategy formulation and implementation; (ii) The Socio-Economic Development Plan (SEDP II 2000-05). The drafting of the Five Year Plans has always been the territory of the Asian Development Bank; (iii) The National Poverty Reduction Strategy (NPRS 2003-05), though presented as a national document, is a flagship initiative of the World Bank.

### III. CONCLUSION

There is a range of explanations about what causes Cambodia economic growth. Clearly, its economic advance was seriously interrupted by war, genocide, and exposure to a lengthy period of communism. Its transition to a market economy was painfully slow and hampered by several constraining factors including difficult initial conditions, an unfavorable demography, and weak resources. Cambodia's performance for the period 1970-2003 have been positively associated with growth. In the last five years, Cambodia's growth performance has been amongst the best. Cambodia's pace of growth is more similar to that of other ASEAN low income countries and of transition countries. Favorable external conditions, including foreign aid flows and trade agreements, have helped propel recent growth. Living standards for Cambodians have improved over the past decade, with poverty rate falling, thanks in large measure to robust economic growth, combined with the restoration of peace, and improved access to services. Though poverty still remains high at 35%, the story is one of high growth and very respectable poverty reduction in a post-conflict setting. On these important outcomes, Cambodia has performed very well.

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## **CHAPTER V:**

# **LEGAL CONVERGENCE**

## Chapter V:

### Legal Convergence

#### I. GENERAL TRENDS IN LEGAL AND ECONOMIC DEVELOPMENT

The emergence of legal institutions and the rule of law has been the subject of much debate, most of which has centered on the argument that there is a nexus between the growth of a market economy and the development of the rule of law.<sup>361</sup> Starting in the 1950s and reaching a zenith during the United Nations development decade in the 1960s, Western - mostly American - scholars urged developing countries to copy modern features of developed countries, including their legal systems.<sup>362</sup> Relying on Max Weber's emphasis upon the contribution of predictable positive law to economic development, early law and development theorists favoured rules that were general and autonomous, with clear boundaries between the public and private spheres.<sup>363</sup> The underlying assumption of this school of thought was, of course, that the inexorable logic of economic modernisation will bring in its wake a modern and rational legal system; in other words, that economic modernisation enables the rationalisation of the legal system.<sup>364</sup>

Nevertheless, the earlier modernisation theories, which took in the form of the 'law and development' movement of the 1960s and 1970s, were short-lived and the efforts

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<sup>361</sup> See above n 19.

<sup>362</sup> The law and development (L&D) movement that started in the 1960s and continued into the 1970s was led by a small hand of liberal lawyers working in development agencies, foundations, and universities in the United States and Europe. They sought to interest development agencies in the importance of legal reform. The L&D movement was built around the dominant Western development paradigm of the time that gave priority to the role of the state in the economy and the development of internal markets. See David M. Trubek, 'Rule of Law in Development Assistance: Past, Present, and Future', above n 1, 75.

<sup>363</sup> John Gillespie, 'Law and Development in 'The Market Place': An East Asian perspective' in Kanishka Jayasurya (ed), *Law, Capitalism and Power in Asia: The rule of law and legal institutions* (1999) 120.

<sup>364</sup> This mode of theorising finds a significant pedigree in the work of Max Weber who - despite noting that the relationship between economic and legal rationality is complex and multicausal - emphasised the extent to which calculability and predictability, so essential to a functioning market economy, was established by the development of formal and rational legal systems. See David M. Trubek, 'Toward a Social Theory of Law; An Essay on the Study of Law and Development' (1972) 82(1) *Yale Law Journal* 1-50.

to change the position of law were not very successful at the time.<sup>365</sup> The swift decline of the law and development movement led to the emergence of a whole series of analyses of institutional change, largely influenced by the methodology of classical economics.<sup>366</sup>

Just as the earlier modernisation theories had a marked influence on the development of legal reform programs two decades ago, so was the growing influence of theories of rational choice institutionalism, for example, in the form of the 'law and economics movement' or 'rule of law' (RoL), which is readily evident in a range of World Bank programs on legal reform.<sup>367</sup> It is apparent that a key objective of these programs undertaken by international financial institutions is to develop a legal environment characterized by respect for property rights, by a law-making process capable of integrating business oriented laws within the prevailing legal system and minimizing regulatory intervention, and by legal institutions capable of implementing those laws in an efficient and transparent manner. Like telecommunications and roads, multilateral and most Western bilateral aid providers assume that rights-based, normative legal systems are a prerequisite of efficient industrial economics.<sup>368</sup>

The exponents of the 'rational choice theory' perspective seek to place emphasis on the importance of legal institutions, and institutions in general, by allowing governments to credibly commit to upholding property rights.<sup>369</sup> Thus, we find

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<sup>365</sup> Ibid. Although the L&D movement was relatively small and short lived, and had little impact on the development policies of its time, it did put the issue of how law related to "development" on the intellectual agenda. On the collapse of the L&D paradigm Trubek argues that :

The movement rested on four pillars; a cultural reform and transplantation strategy: an ad hoc approach to reform based on simplistic theoretical assumptions; faith in spill overs from the economy to democracy and human rights; and a development strategy that stressed state-led import substitution. In the course of the 1970s all four of these pillars crumbled.

<sup>366</sup> Neo-institutional economics is associated with the names of two Nobel Prize winners of the 1990s, Ronald Coase and Douglass North. Ronald Coase's Nobel citation states that he won the prize "for his discovery and clarification of the significance of transaction costs and property rights for the institutional structure and functioning of the economy." North's contribution, according to his Nobel citation, was to renew "research in economic history by applying economic theory and quantitative methods in order to explain economic and institutional change." Kenneth W. Dam, above n 19, 2.

<sup>367</sup> The World Bank estimates to have supported 330 "rule of law" projects dealing with legal and judicial reform in over 100 countries. It has spent about \$3.8 billion since 1993 (World Bank Annual Reports 2003 and 2004, p. 30 and 35, respectively). See Legal Vice Presidency, The World Bank, *Legal and Judicial Reform Observations, Experiences, and Approach of the Legal Vice Presidency* (2002) 14. <[http://www4.worldbank.org/legal/publications/ljrobervations\\_final.pdf](http://www4.worldbank.org/legal/publications/ljrobervations_final.pdf).>

<sup>368</sup> See Carothers, above n 25, 3-13. (first printed in Foreign Affairs 95-107 (1998)).

<sup>369</sup> North argues that the nature of institutions depend on what kind of rules the government makes and how the government enforces them. They are particularly interested in protection of property rights

rational choice institutionalists claiming that successful long-term economic growth requires incentives for political as well as economic actors to desist from rent seeking.<sup>370</sup> From this perspective, institutions reflect the rise and success of commercial minded interests whose primary aim lies in the establishment of a set of institutions that restrict the ability of rulers to engage in predatory and rent seeking behaviour. Consequently, a credible legal framework that guarantees property rights becomes a central element of this institutional ensemble, which provides a kind of backing for the market participants on centre stage.<sup>371</sup>

Despite some theoretical differences, both modernization and rational choice theories share a number of elements.<sup>372</sup>

First, they assume a nexus between the development of market forms of economic life and the emergence of stable effective legal regimes. Indeed, there is a striking similarity in the Weberian idea of the legal system providing a calculability and predictability of actors in the market and North's thesis that legal institutions provide a framework for states to provide credible commitments to market-enhancing property rights. In both instances, the legal system is seen as the handmaiden of the market. A subsidiary assumption in this respect is that law is about creating a set of bargaining chips or a set of entitlements and rights that enable transactions to be carried out between various market participants, all of which are predicated upon the existence of an independent and autonomous civil society.

*Second*, both theories share, to an extent, the assumption that the development of the market leads to the emergence of a strong middle class or the presence of commercial interests which in turn hastens the development of representative institutions and the rule of law. Implicit in this argument is that institutional change arises from pressures

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because it affects the cost of transactions. The lower the cost of transactions, the greater the volume. The greater the volume of transactions, the greater the volume of production (therefore, higher economic growth). See North, above n 29.

<sup>370</sup> Mancur, above n 22.

<sup>371</sup> Ibid. Mancur offers his view that one explanation for changes in institutions comes from considering the incentives of those in power. He suggests that a mechanism for change is to increase the understanding of the elites, both inside and outside of government.

<sup>372</sup> Kanishka Jayasurya, 'Introduction: A framework for the analysis of legal institutions in East Asia', above n 28, 5-6.

on the state generated by social and economic forces unleashed by the development of a market economy. In this context, institutional change is seen as a product of revolution from '*below*' rather than from '*above*'.

*Third*, both theories assume that the major dynamics driving institutional change are *internal* to the nation-state. This can be clearly seen, for instance, in the overriding focus in both approaches on the link between the rise of a domestic middle class on the one hand, and the emergence of liberal legal systems on the other. Yet, dynamics which are *external* to the nation-state may also play a central role in shaping institutional change.

*Finally*, both theories assume that the development of the rule of law is associated with the following institutional characteristics: the rise of a liberal, political and social outlook alongside the rise of parliamentary and representative democracy; the growth of an independent associational life; the emergence of an independent and neutral bureaucracy; and, the growing influence of a civil language in fashioning relations between the state and its citizens. In other words, the emergence of legal institutions is associated with a package of liberal institutions that transform state-society relationships.<sup>373</sup>

## **II. CAUSAL RELATIONS BETWEEN LEGAL DEVELOPMENT AND ECONOMIC DEVELOPMENT: SUPPORTING THE CONVERGENCE HYPOTHESIS.**

International experiences suggest strong evidence for causal links that go from changes in economic policy both to economic development and to the legal system which then further affects economic development. The evolution of legal systems in resurgent Asian countries offers important insights into the causal relations between legal development and economic development. This is not a simple unidirectional causality, nor are the legal system and economic development the only variables. With economic policies factored in, the relationship between these three variables is multicausal.<sup>374</sup>

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<sup>373</sup> Tamanaha, above n 24.

<sup>374</sup> Kastharina Pistor and Philip A. Wellons, above n 70, 109.



Economic policy regimes provide a context for the evolution of the legal system and its relation to the economy. Overall, we found that broad patterns in economic policy periods and economic growth during these periods related to the broad patterns identified for the legal system. As an economy switches from an economic strategy of import substitution to export-led growth, for example, the legal system may adjust to support the new strategy. In this case, the content, or substance, of laws in such areas as property rights and cross-border transactions could change to fit international standards. Moreover when the policy was to promote growth in certain sectors, such as high-technology industries or financial services, the economy often enacted laws oriented toward providing intellectual property protection or laws aimed at regulating banks and stock exchanges.

The Cambodian experiences seem to suggest a mixed outcome suggesting that, in the early phase of economic development, economic performance bears little or no relation to the development of a credible legal system. The recent rise of the modern Cambodia and its market-driven economy has generally neither been accompanied by the development of the rule of law, nor by the institutionalisation of rule of law norms in its commercial legal regime. The causal connection is attributed to other factors like the overwhelming injection of development aid, and the attraction of foreign direct investment to capture economic rent both at the domestic and international level.

The causal connection does clearly matter, however, at the latter stage of economic development as the lack or the slow emergence of a credible legal institutions hampered economic growth and modernization.

As the economy becomes larger in size and more sophisticated in scope inefficient state-allocative laws and discretionary procedures deter market transactions which in turn hurt economic growth and affected development. For example, we could identify the causal relation between legal and economic change with respect of weak corporate governance and the lack of development of capital markets. Despite a clear policy direction Cambodia had difficulties to start a stock market due to lack of institutional

and legal infrastructure.<sup>375</sup> The importance of transparency and solid market oversight has been recognized by investors and policymakers in light of the Asian financial crisis in 1997-98.<sup>376</sup> In the area of security interests important signs pointed to ways in which the lack of a variety of laws discouraged credit extension that allowed secured lending to take place, prohibiting development. The lack of a functional bankruptcy system may have prevented many creditors from filing for insolvency. This would have triggered a run on the assets by other secured lenders which in turn would have undermined reorganization attempts aimed at protecting the economic value of the firm as a going concern.<sup>377</sup>

On the link between economic policy and the legal system the causal connection seem more evident, though at varying degree during various policy periods. The link is clearest only in the early periods of direct state intervention and the stagnant socialist policy. Cambodia came close to a purely state/discretionary and highly politicized system in the 1980s, having abolished market/ rule-based laws and institutions earlier. The policies then were supported by state-allocative laws and discretionary procedures. Laws were used as an instrument of change and legal change often preceded economic outcome. The laws which were enacted during the period of active state intervention were aimed at implementing state policy and controlling economic behavior.<sup>378</sup> Indeed, many of the laws conferring substantial discretion on the bureaucracy seemed justified by the recovery after the many years of civil war. An example is the adoption of legislation to establish state agencies with the task of

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<sup>375</sup> In May 2007 Moody's gave the country's government bonds a credit rating of "B," five rungs below investment grade while Standard & Poor's put Cambodia at "B+," four levels below investment grade. Thomas Byrne, a vice president of Moody's Investors Service stated that "the very weak state of governance in terms of overall effectiveness of government operations, regulatory quality and rule of law adversely affect Cambodia's credit fundamentals". See 'Cambodia plans stock market for cash-strapped economy, but will companies open their books?' *The Associated Press* (Phnom Penh) 18 November 2007.

<sup>376</sup> Kastharina Pistor and Philip A. Wellons, above n 70, 150; See also Stephan Haggard, *The Political Economy of the Asian Financial Crisis* (2000), particularly Chapter 4: The Politics of Financial and Corporate Restructuring, 139-182.

<sup>377</sup> For an analysis and update of the status of various commercial laws and practices, including bankruptcy and secured transactions, see United States Agency For International Development (USAID), *Southeast Asia Commercial Law & Institutional Reform and Trade Diagnostics: Cambodia Final Report* (2007).

<sup>378</sup> The Cambodian legal system in the 1980s resemble those of five Asian economies during their various policy periods of direct state intervention: Taipei, China, 1973-1985, the period of import substitution and export promotion; Republic of Korea, 1973-1979, the period of heavy and chemical industry development; India, 1967-1980, the period of closed stagnant socialist economy; Malaysia, 1969-1985, the period of increased state intervention; and Japan, 1960-1970, the high growth period. See Kastharina Pistor and Philip A. Wellons, above n 70, 63-111.

regulating and controlling trade and other economic activities. The non-state enterprise sector developed without elaborate company or partnership laws in place. Procedures for the non-state sector remained discretionary and often informal, in the absence of legal framework.

Cambodia did not have, at any point afterward, a legal system that was entirely market-allocative and rule-based or state-allocative and discretionary, rather a mix of the two. The patterns of legal change suggest that the relationship between economic policies, legal change, and economic development has fluctuated back and forth over time.

International experiences suggest that economic convergence does not necessarily imply convergence of legal systems. For convergence of laws, economic policies rather than the stage of economic development were primarily responsible. Convergence of the Cambodian legal system is the result of several factors interconnected at different levels: (i) at the macro level, the internationalization of law and globalization of markets and to a certain extent some political convergence or democratization; (ii) at the meso level, the effect of legal transplant on the development of legal institutions and, last (iii) at the micro level, the internalization or buying-in at the societal level.

### **III. CAMBODIA'S FACTORS OF LEGAL CONVERGENCE**

*At the macro level*, legal convergence occurs when domestic development, together with growing internationalization of markets, results in the creation and development of law and legal institutions that, if not identical on paper, perform largely similar functions around the world. The factor of legal convergence is the internationalization of law, notably in the normative rules and due process for international commercial transactions. It is directly linked to the other factor which is the trend towards global and international markets. Globalization and democratization made existing international standards even more relevant to commerce. International agreements, along with conditions imposed by multilateral agencies, support globalization. These international rules and market forces generally curtail the discretion of national actors.

The policy shift toward market-allocative law took place gradually in the early 1990s and continued to the present, with two distinct policy periods: reform and liberalization (1991 to 1999) and globalization (2000 to the present). Economic indicators for this policy shift include privatization measures, opening of trade and, in particular, of foreign direct investments and liberalization of financial markets.<sup>379</sup> The policy change that shifted allocative rights from the state to the markets was implemented by the gradual repeal of many of state-allocative laws and the subsequent introduction of numerous market-allocative laws. Most of these laws providing off-the-shelf rules for private transactions were transplanted, with minor revisions to meet the needs of market oriented economic policies.

The worldwide trend towards more market-based economic strategies and the growing internationalization of trade and commerce was important for Cambodia's subsequent shift towards market-allocative law. Changes in world markets in the textile and clothing had a strong influence on Cambodia's economic policies that emphasized a heavy export-led growth.<sup>380</sup> Pressures from key bilateral trading partners, driven by the US and the EC, and multilateral financial institutions such as the Bretton Wood institutions<sup>381</sup> and the World Trade Organization consolidated this trend.

Worldwide economic globalization supported by the international harmonization of laws and legal norms left a strong imprint on the Cambodian legal system. Since the Peace Accords in 1991, Cambodia has taken part in this process, having ratified many treaties and conventions and becoming member of numerous international organizations like ASEAN and WTO. Cambodia made considerable headway in enacting numerous laws needed to underpin the good functioning of a free market economy in response to demands by economic actors eager to pressure for changes in aspects of the legal system that specifically affected them. Foreign investors, typically considered as the most outspoken advocates for legal reforms and for strengthening legal institutions, and their national entrepreneur counterparts wanted to see their

<sup>379</sup> See Chapter II, pages 57-71 on the highlight of various national development policies.

<sup>380</sup> See Chapter II, pages 23-7 on the background of the Bilateral Textiles Agreement with the US.

<sup>381</sup> Pressures originated way back to the days of the peace process when Bretton Wood institutions like the World Bank and the IMF and other major bilateral donors assert their agenda in the Ministerial Declaration. See Chapter IV, footnotes 342 and 343.

prospects for growth enhanced. Implementing WTO agreements, initially related to the development of legislations and the establishment or improvement of administrative structures, called for the build up of a comprehensive legal framework comprising of more than 40 legislative and regulatory instruments.

Underpinning the policy shift toward market-allocative law is the recognition by the Government that state-allocative laws and discretionary practices permeate throughout the economy - in particular investment approvals, business licensing, land concessions, privatization, and procurement - and serve as windows of opportunity for corruption. With all these forces at play, there emerged for the Government a pressing need, and to a far greater extent than has been the case at any previous time, to develop a coherent legislative agenda to promote more transparency and instill confidence in the reform process.<sup>382</sup> As a result various government ministries and agencies were tasked to prepare a legislative and regulatory agenda in a way that serves the overarching context for the reform program.<sup>383</sup> The internationalization of law has also affected legal procedures as exemplified by Cambodia's ratifications of, among others, the Convention on the Recognition and Enforcement of International Arbitral Awards (the New York Convention) and other conventions on matters related to environment, investment, and intellectual property rights.<sup>384</sup>

Despite intermittent political instability, the post 1993 period witnessed most significant improvements - both in quantity and quality - in terms of legal development. Gradually, beginning in 1999, the contemporaneous shift in politics toward regional and world integration generated a new momentum for a qualitative change in laws and in the legal process. Existing laws and legal procedures, though

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<sup>382</sup> Even during the WTO accession process, Member States have made expressly clear this issue of transparency. As part of its accession package, Cambodia was required to fully apply the transparency requirements prescribed in Article X of the GATT 1994, Article III of the GATS and other articles regarding transparency on the WTO Agreements. As a result, Cambodia committed itself to 3 transparency related actions: (i) to provide at least 30 days for comments on all proposed new measures affecting trade in goods, services or the protection of intellectual properties; (ii) that no such measure will become effective until it is published in the Official Journal; and (iii) to make available on an official website the body of all current laws, regulations and decrees, as well as administrative and judicial rulings, relating to trade. For more on Cambodia's commitments under the WTO accession see Sok, above n 131.

<sup>383</sup> The Legislative and Regulatory Action Plan was in large part inspired by the works undertaken by the Council of Legal and Judiciary Reform. See Sok, *Formulation of a Legal and Judicial Reform Strategy*, above n 284, 22-25.

<sup>384</sup> See Annexes 3.5, 3.6, and 3.7 for a list of treaties, conventions, and bilateral agreements.

primarily state-allocative and discretionary in nature, saw the gradual introduction of market-allocative elements.<sup>385</sup> New substantive and procedural laws, many of them introduced to govern a new nation, supported not only market allocation but economic diversification, though in a quasi laissez-faire economy. Indeed 77, or two-thirds of the 110, new laws enacted during this period concerned the economy. In the pre and post WTO accession period, changes in the legal system were qualitative, signaling a basic shift in the legal system.<sup>386</sup> The changes, which strengthened market-allocative laws relative to state-allocative laws, were more evident than the changes from rule-based procedures over discretionary procedures.<sup>387</sup>

Another factor prompting legal convergence is a fundamental change in the perception of the state's role in economic development as reflected in the relationship between the state and its citizens. As economic policies expanded the scope of market activities, the discretionary power of state officials in charge of enforcing the laws was gradually reduced in two instances: in the first instance, although the state retained overall extensive discretion over economic activity, new laws and institutions improved the capacity of private actors to fend for their own rights; in the second instance, although not all laws that reduce government power include procedural rights for private parties important changes took place in implementation of rule-based procedures, giving private parties procedural rights to mobilize the law on their behalf and limiting the discretionary power of the state officials.<sup>388</sup>

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<sup>385</sup> Two specific cases are worth mentioning: (i) amendments of the Law on Investment shift the investment incentives from a negative list to a positive list; and (ii) the removal of the requirement for having a 51% Cambodian nationality shareholding to engage in trading activities.

<sup>386</sup> Many draft laws have benefited from the comments from members of the WTO Working Party and international organizations like WIPO, UNIDO, and UNCTAD.

<sup>387</sup> One of the explanation is probably the effects of the civil law influence where, after the enactment of a specific law, the passage of implementing regulations could take years leaving in between room for discretionary abuses. A concrete case is the Law on Investment which was enacted in 1994 and the Implementing Sub-Decree was passed only four years later in 1998.

<sup>388</sup> The Government's capacity to engage in policy dialogue with the private sector is growing, and participatory mechanisms are now regularised and mainstreamed into policy development, public planning or monitoring processes. For example the Law, Taxation, and Good Governance Working Group regularly met, discussed and decided on a number of issues. For illustration purposes, on 23 May 2007 the Working Group decided on the following issues: 1) Breach of Trust; 2) Law on Accounting (Audit Threshold); 3. Registration of Rights to Possess Immovable Properties to Foreigners; 4) Draft Trust Law; 5) Special Tax; and 6) Law on Insurance (Solvency Requirements). There is also increasing participation from civil society groups and a relatively unsophisticated media is beginning to exercise its advocacy role.

*At the meso level*, legal convergence relates to the long standing question as to whether transplanted legal system works in the same way as it does in its places of origin, and if so, under what circumstances legal transplant has an effect on the development of legal institutions in the recipient countries.

The reception of Western law by Cambodia took place since the second half of the nineteenth century. Political factors, which included the military and economic conquest by France, greatly influenced not only the source of law but the scope of legal change. After four years of *tabula rasa* by the Pol Pot regime, the process of legal borrowing from foreign sources continued in the 1980s, predominantly from socialist countries. After 1993, the borrowing process intensified to replace earlier laws which proved ineffective for the functioning of a market economy. The reconstruction and development of legal reform programs received marked influence from legal transplants. Many bilateral and multilateral donors have begun assisting the Government of Cambodia in rebuilding the nation's legal and judicial systems.<sup>389</sup> As part of an overall package of reconstruction assistance, external agencies have sought the re-establishment of a governance framework by strengthening government institutions, restoring law and order, and enabling civil society organizations to work more effectively.<sup>390</sup> In brief, their beliefs were at the core of the shared assumptions of modernisation and rational choice theory which stressed that the growth of legal institutions is a product of the process of economic and social modernisation, mediated by the growth of commercial interests.

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<sup>389</sup> See Annex 5.1 for a list of projects and programmes supported by donors.

<sup>390</sup> The concluding declaration of the Ministerial Conference on the Rehabilitation and Reconstruction of Cambodia (MCRRC) made explicit the issues "for the development of Cambodia's economy in the future":

International financial institutions [World Bank, IMF, and ADB] stressed the importance of market-based reforms in Cambodia to increasing output in major sectors of the economy.....

There remain fundamental institutional and policy-related constraints to further economic progress....

We stress our resolve.....to extend appropriate assistance.....to Cambodia.....that ensure[s] and strengthen[s] Cambodia's own capacity to sustain its development.....

We are hopeful that..... Cambodia can expand and diversity its external trade and investment relationships, so that it will be integrated into the dynamic economic development of the Asia-Pacific region and of the world.

See 'Tokyo Declaration on the Rehabilitation and Reconstruction of Cambodia, Issued at the Conclusion of the Ministerial Conference on the Rehabilitation and Reconstruction of Cambodia on 22 June 1992.

Concretely, the justification for pushing for convergence of the Cambodian laws and legal institutions to regional and emerging global standards is quite straightforward: inadequate legal and inappropriate regulatory frameworks, lack of transparency and access to information greatly increases transaction costs for business, removes a level playing field for all players including small businesses, fosters corruption and hampers private sector development.

Most of the legal assistance projects were to a large extent influenced by the neo-liberal modernist movement which has always acknowledged the gaps between transplanted legal theory and reality. These projects were designed to fill these gaps on the one hand while on the other they were aimed at stimulating social, political and economic institutions to reorganise to foster development. Influenced by these views, Western legal assistance to Cambodia attempts to refashion through capacity building existing institutions into the neo-liberal mould. Projects are overwhelmingly concerned with perfecting legislative drafting, establishing a normative legal framework, strengthening legal institutions (particularly the courts), increasing the number of lawyers, and providing Western commercial legal training.<sup>391</sup>

*At the micro level*, legal convergence would occur when the norms governing rulemaking, legal forms, and court proceedings have played an equally important role for economic development in Cambodia. If alternative institutional arrangements have proved to be more viable, this would suggest divergence of legal institutions.

In the area of corporate law, Cambodia had converged with Western style corporate law already in the 60s and 70s until its total dismantling during the genocide regime.<sup>392</sup> However, the contribution of the corporate form to the process of capital formation depended on the development strategies pursued during different policy periods. The post genocide policies favored the growth of the state-owned sector at the detriment of the development of the private sector. After the reversal of these policies in the mid 90s the private sector development was encouraged. Although

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<sup>391</sup> Almost every multilateral and bilateral donor has financed the drafting, and the capacity building, of at least one economic related law (See Annex 5.1 for the list).

<sup>392</sup> The first *Code de Commerce* enacted in the 1960s was comprehensive in nature and of high standard reflecting quite appropriately the then current corporate law and practice.



amendments altered many a transplanted law, there remained more similarities than differences, in particular, with regards to corporate forms, and more generally, with regards to commercial laws. However, legal and business practices continued to differ substantially from the laws on the books as state discretionary practices constrained heavily market activities.

In the area of dispute settlement, international experiences suggest that the availability of effective and low cost dispute settlement is an important condition for expanding markets, for meeting the increasing complexity of economic development, and thus for economic development itself. Over the last decade, the rates for litigation concerning civil and commercial disputes increased dramatically in Cambodia, thus lending support to the convergence hypothesis, which suggests that with economic development, legal institutions will perform increasingly similar functions throughout the world.<sup>393</sup>

In recent years, there is a clear recognition that alternative dispute resolution has become the preferred path, in particular in the area of labor disputes. In an economy driven by garment export, it is most important that Cambodia finds a way to settle industrial conflicts before disputes result in demonstrations, strikes, and, more often than not, violence, not to speak about their serious economic consequences. At the enterprise level, a strike may lead to loss of output and a failure to meet other deadlines, which in turn may result in companies losing needed contracts and customers.

At present, there are no specialized courts to facilitate independent arbitration in Cambodia. However, the establishment of a commercial court and commercial arbitration is envisaged under Cambodia commitments to the WTO, and a non-binding arbitration was recently established to resolve labor disputes. Established in 2000 under the 1997 Labor Law, the Labor Arbitration Council (LAC) was established to resolve labor disputes and has since earned its reputation as the only

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<sup>393</sup> Sok Siphana, Sarin Denora, and Eric Le Dreau, *Cambodia: Disputes Resolution. Asia Disputes Resolutions, Legal and Fiscal Handbook for Exporters* (1999) [trans of : *Cambodge: La Resolution des Differends. Asie Reglement des Differents, Cahier Juridiques et Fiscaux de L'Exportation*].

institution that is currently consistently applying its decisions on similar matters.<sup>394</sup> As a result of this consistency, trade unions, employers, and some members of the legal community appreciated more the certainty and predictability in the arbitration awards and interpretation of the Labor law. The LAC awards are published by its Secretariat and are accessible on demand and through its website.<sup>395</sup> Since the consistency, certainty and predictability is the core of developing a legal system and rule of law it is encouraging to witness such a trend and momentum for change. Even the judiciary, widely criticized as unpredictable and corrupt, at the moment does not openly publish its written decisions or judgments.

Evidence suggests also that economic agents have increasingly used formal dispute settlement institutions to solve their conflicts. Litigation rates overall have increased with economic development and are higher now than they were in 1991.<sup>396</sup> Moreover, disputes are more likely to end up in the courts even if they are first filed with mediation institutions. Overall, the results of civil and commercial litigation on the one hand suggest some legal convergence with signs of increasing litigation with socioeconomic development and political change. On the other hand, the results of administrative litigations suggest some legal divergence as there is no movement or any substantial progress in that direction. To date we see no perceptible trend from discretionary to rule-based law as reflected in the establishment of legal procedures that allow non-state agents to hold the state as well as state officials accountable to the law. The lack of transparency of law and the unpredictability of administrative decisions have been a major problem for decades for the private sector.

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<sup>394</sup> In the past four years the LAC has handled 369 cases of dispute complaints between factory owners and employee workers. *Development Weekly* (Phnom Penh) 12 – 18 March 2007.

<sup>395</sup> See Arbitration Council web site at <<http://www.arbitrationcouncil.org/en~index.htm>> at 30 June 2008.

<sup>396</sup> According to reports of the Phnom Penh Municipal Court, in the last three years it has on average 5,000 civil cases per year. See 'Municipality disseminates procedures of civil codes', *Development Weekly* (Phnom Penh) 23 – 29 July 2007.

## **CHAPTER VI:**

# **LEGAL DIVERGENCE**

## **Chapter VI:**

### **Legal Divergence**

#### **I. LEGAL DIVERGENCE IN CAMBODIA**

Legal divergence in Cambodia can be stylized as happening at three levels: at the *macro* level there is a slow shift from State-allocative toward market-allocative laws and from discretionary practices to rule-based procedures; at the *meso* level where there are striking differences in the institutional environment - legal processes and legal institutions, in particular the role of courts; and last at the *micro* level where factors of divergence are prominent both at the demand side and at the supply side.

##### **A. *Legal Divergence at the Macro Level***

The effects of worldwide economic development, while giving rise to a large extent the harmonization of laws, also promoted the development of standardized rules for international transactions. This has had its effects on the allocative as well as on the procedural dimension of law. During the period there was slow shift from state-allocative toward market-allocative laws and from discretionary practices to rule-based procedures. Changes in legal processes in Cambodia have been slower to implement, thus indicating a certain degree of legal divergence.

##### **1. *Control by the Executive***

When Cambodia embarked on its reform course in the late 1980s, it decided, that to liberalize markets and develop the nonstate sector, it needed laws that would support the growth of markets. The nonstate enterprise sector developed without elaborate governing laws in place. While changes in laws encouraged export-oriented foreign investment to continue, government licensing of domestic and foreign businesses grew, along with controls of trade and foreign exchange, creating discretionary procedures that became administrative barriers to private commerce. Procedures for the nonstate sector remained discretionary and often informal, in the absence of a legal framework.

In the 1993-2005 period, changes tilted back a bit toward market-allocative law, though the entire system retained its state-allocative and discretionary cast throughout. Piecemeal adjustments in substantive law and legal processes responded to different policy needs, but often hesitantly. With the accession to the WTO, discretionary procedures were modified at the very end of this period in a way that could shift the system toward market-allocative laws and rule-based procedures and away from state-allocative laws and discretionary procedures. Despite a reduction in some state-allocative laws and discretionary procedures, a substantial body of procedures remained discretionary in key sectors, with the government systematically exercising substantial discretion in drafting and interpreting guidelines.<sup>397</sup>

Government control over the economy through the legal system did not evaporate. Controls remained tight on the management of state assets like natural resources, which is of great political significance.<sup>398</sup> Government enforcement of certain laws, such as those for intellectual property, was weak.<sup>399</sup> Environmental laws which were introduced largely to comply with international conventions remained unenforced for many years.<sup>400</sup> Evidence of state-allocative laws and discretionary practices permeate throughout the economy, in particular in the following areas:

(a) *Privatization:* Privatization was rapid with political factors, rather than the legal system, being the major stimulus.<sup>401</sup> The changes did not signal a major reduction in the power of the executive over the economy. On the contrary, despite policies to promote privatization of existing state enterprises and new projects using a build- operate- transfer approach as opposed to government ownership, the

<sup>397</sup> Some of the key economic sectors affected are resources sector like forestry, fisheries, and agricultural concessions.

<sup>398</sup> It took fourteen years before the Government passed a new forestry law to replace the 1988 forestry law which critics argued had so many loopholes.

<sup>399</sup> Intellectual property rights protection was quite a new concept to Cambodia. With the exception of a few officials at the Ministry of Commerce who worked primarily on trademark protection, most of the government officials and the public at large were not much aware of it until midway through the WTO accession process when the Government undertook a major awareness campaign.

<sup>400</sup> The environment law was passed in 1996 and it took another three years before any implementation sub-decree was adopted.

<sup>401</sup> For a thorough analysis of the political factors leading to the Paris Peace accords and the ensuing massive privatization drive by the Government of the State of Cambodia, see Gottesman, above n 50, 318-320.

government took the initiative in identifying the projects and the recipients, and relied primarily on directives and persuasion to guide the process. In this context, the case of Cambodia is not unique. The very complexity and lack of predictability in the legal systems in numerous transitional and developing countries where governments lack of accountability and transparency serve as windows of opportunity for corruption. Paradoxically, as these economies liberalize and open their doors to foreign investment and trade, the very processes of change privatization, procurement, and the like - become areas where corruption tends to flourish.

(b) *Ineffective natural resources management*: The land law continued to be poorly administered and enforced, and registration was often defective. Property rights were strengthened for the general population but had limited or no effect on the executive's ability to grab land. The problem of land grabbing by government officials was so acute that the Council of Ministers issued a directive demanding their return to the state. The 5 July directive states: '[O]fficials of the government, National Assembly, Senate, court, local authorities, and members of the armed forces who clear forest land for their personal ownership, must hand it over to the state to allow the Forestry Administration to replant trees'.<sup>402</sup> While progress is being made, tenure insecurity remains a core constraint for economic and social development in Cambodia and certainly is a factor for rising inequality.<sup>403</sup>

Government measures to govern forestry concessions and to suppress activities deemed detrimental to the sector had not led to any significant results. Despite progress made with support from donors to adopt various regulations to provide for greater local involvement, transparency and accountability - serious shortcomings in their implementation became the major focus of concerns for donors.<sup>404</sup> In the area of

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<sup>402</sup> See 'Council of Ministers demands gov't officials return forest land', *Development Weekly* (Phnom Penh) 01 – 07 August 2005.

<sup>403</sup> Steven Shornberger, World bank's rural sector coordinator argues that 'the acquisition of land through illegal means simply extends a situation of uncertain security of tenure which undermines investment in better soil production and long term crop development'. See *Development Weekly* (Phnom Penh) 20 - 26 February 2006

<sup>404</sup> Mogens Laumand Christensen, 'Intervention on behalf of Donors on Forestry and Environment' (Speech made at the Meeting of the Government-Donor Coordination Committee (GDCC), 12 December 2005).

oil and gas, negotiations of oil and gas concession agreements were held in the utmost secrecy.<sup>405</sup>

## **2. *Discretionary and Weak Enforcement of Laws***

Another element of legal divergence is the discretionary and weak enforcement of laws. Throughout the period, broad discretionary procedures supported the strong authoritarian government. Administrative discretion grew as most of the new rules took the form of administrative regulations rather than legislations. The latter set out only principles, delegating their interpretation and enforcement to the administration giving government officials substantial discretion in practice. In key parts of the economy, the executive branch based its substantial control over the economic sector on laws where it could flesh out the rules and determine how they applied.

In the area of private participation in infrastructure, the LoI made only a vague reference in one article leaving the subsequent interpretation in the Sub-Decree on Built-Owned-Transfer (BOT Sub-Decree). When the sub-decree was adopted a few years later, its provisions were still vague and did not bring much guidance in the management of the sector. As a consequence, several major infrastructure projects were awarded without the benefits of a well thought through law. A decade later, when the Law on Concessions was passed by the National Assembly, concerns on the lack of transparency and ambiguity remained, i.e. the 43 article law states that the government can lease state-owned properties, including museums, utilities, healthcare and roads to private companies for up to 30 years following a public bidding process. In other parts of the economy, different processes laying the base for greater discretion also supported the strategy of the government to strengthen its own powers, beginning what would later become a more obvious shift to state-allocative laws and discretionary procedures. To promote economic diversification, the government established many regulatory and development boards without constitutional or parliamentary oversight. The proliferation of these boards entirely controlled by the

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<sup>405</sup> On the mining and petroleum sector, negotiations occurred in the context of a complete legislative and regulatory vacuum.

Executive can probably be viewed as the biggest loophole in the system of checks and balances.<sup>406</sup>

Despite constitutional protection, citizens during this period were limited in their ability to seek redress for official acts. With the practice of suing government officials for corruption or malfeasance unheard of, state and party officials are subject to few legal constraints. In practice, government officials were able to abuse citizens' rights with impunity. No effort to enact administrative procedure law was made to increase the transparency of government activities that affected the private sector. The existence of such a law would set formal standards for decision-making and gave affected parties the right to challenge them.

The unbounded bureaucratic discretion and state-allocative power of the government could be illustrated in three concrete areas: investment approvals, business licensing, and land concessions. Most new economic laws and regulations governing the three areas placed allocative rights with the state and control over the investment incentives and rules making for business entry gave the Executive enormous leverage.

(a) *Investment approvals:* The Law on Investment (LoI) offers some of the most attractive incentives in the region in a framework which, on paper at least, is one of the most straight forward and streamlined.<sup>407</sup> However, the operation of the approval procedures in practice and the perceived additional costs of obtaining an investment approval have limited the attractiveness of investment in Cambodia at the benefit of other prospective destinations in the region.

The LoI and its implementing sub-decrees in themselves are quite straightforward with regard to outlining the procedures for investors to apply for status as investor. The LoI streamlines investment procedures by creating the Council for the Development of Cambodia (“CDC”) as the ‘sole and one-stop service organization responsible for the rehabilitation, development and the oversight of investment

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<sup>406</sup> See *Development Weekly* (Phnom Penh) 17 – 23 September 2007; See also Public-Private Infrastructure Advisory Facility (PPIAF), *Cambodia Country Framework Report on Private Participation in Infrastructure*, above n 56.

<sup>407</sup> United Nations Conference on Trade and Development (UNCTAD)/International Chamber of Commerce (ICC), *An Investment Guide to Cambodia: Opportunities and Conditions* (2003).



activities.’ A 45 days deadline is explicitly written into the law to ensure that requests for approval of foreign investment and failure to meet the deadline may result in criminal sanctions for culpable government officials.

Although the CDC acts as a one-stop service to process the investment license, it still has to involve many ministries. Under the one-stop service concept, it is very difficult for the CDC to assure that all ministries issue the necessary authorizations, permits and licenses within the time limit provided in the law. In theory the CDC has representation from all ministries at the level which is necessary to make ‘one-stop’ investment approval a reality. However, ‘one-stop’ investment approval in Cambodia is currently more of a goal than a reality. Part of the explanation is structural. Ultimately, the CDC must forward to the Council of Ministers for approval certain investment applications meeting special criteria, such as investments in excess of \$50 million dollars, and investments of a politically sensitive nature, i.e. investment in natural resource development, investment negatively impacting on the environment, and investments under BOT schemes.<sup>408</sup>

Reviews of the LoI concluded that it suffered in several respects. Amongst other things, the LoI was regarded as being subject to too much discretion in its application, leaving unnecessary investor uncertainty and potential for manipulation.<sup>409</sup> In recognition of the problems associated with the current investment incentive regime, a number of changes to the LoI were formulated. By mid-2001 the Government identified and set in motion certain procedural reforms designed to speed up and render less bureaucratic the registrations and approval process for investors seeking to access investment privileges. Broadly speaking, changes to the LoI seek to rationalize the investment regime so as to limit discretion, improve transparency, and reduce the administrative burden of the current LoI.

Despite these efforts the bureaucracy that has grown up around the operation of the CDC has not, in practice, been able to fulfill the promise of fast and efficient

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<sup>408</sup> See previously cited *Law on Investment 1994*; Sub-decree No. 51 on the Organization and Functioning of the Council for the Development of Cambodia 1995; Implementing Sub-decree No. 88 of the Law on Investment 1997; Sub-decree No. 11 on Built-Operated-Transfer (BOT) 1998.

<sup>409</sup> See Foreign Investment Advisory Service (FIAS), *Report on the Review of the Law on Investment*, above n 235.

investment approvals provided for by the LoI. Cambodia's investment regime remains heavily discretionary, selective, complex, and open to abuse. In addition, Cambodia is a country where personal contacts are still seen as critical and foreign investors feel that their relationship with the relevant individual ministry (and relevant persons within that ministry) remains an important part of establishing and operating an investment in Cambodia.<sup>410</sup>

(b) *Business registration and licenses:* Obtaining operating licenses is much more widespread in Cambodia than commercial registration. Even unregistered enterprises require operating licenses. As a result, a single enterprise is required to obtain several operating licenses from various relevant ministries. The process for obtaining operating licenses can be very lengthy. Procedures vary from ministry to ministry with each one having its own guidelines most of the time not as apparent to the applicants. Some procedures could include onerous burdens such as providing a personal biography and an endorsement by the local commune leader.<sup>411</sup>

The cost of registration and licensing is also an obstacle to entering the formal sector. Because of the complexity of the actual registration process, enterprises typically use formal or informal facilitators who charge a fee to manage all the application forms and provide liaison services with the government agencies. In general there is little incentive for smaller enterprises to register with the Ministry of Commerce (MoC) since it may increase their reporting requirements and costs associated with being a registered enterprise. Enterprises reluctantly go through the process as they need to be registered to be able to gain access to government contracts and formal bank lending, receive investment incentives, and obtain import and export licenses. Cambodia remains a challenging place to do business, with the World Bank Doing Business Report ranking it 143 out of 175 countries in terms of the ease of doing business. For example, in Cambodia, it takes 10 procedures and 86 days to start a business.

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<sup>410</sup> Ibid.

<sup>411</sup> For a thorough assessment of the constraints facing the private sector see, eg, World Bank, *Towards a Private Sector Development Strategy for Cambodia* (2004); Ministry of Industry, Mines and Energy (MIME) and Asian Development Bank (ADB), *Private Sector Assessment for the Kingdom of Cambodia* (2003); MIME, *Preparing the Small and Medium Enterprise Development Program* (2004); Mekong Private Sector Development Facility (MPDF), *Financing SMEs in Cambodia: Why do Banks Find it so Difficult?* (2003); MPDF, 'The Private Manufacturing Sector in Cambodia, A Survey of 63 Firms' (Private Sector Discussions Paper No. 11, November 2000).

Moreover, Cambodia has the most annual inspections, the highest cost per capita to officially register businesses, and requires management time to deal with officials on par with China. Import processes require 45 documents, many of which are associated with unofficial fees.<sup>412</sup>

(c) *Granting of economic land concessions*: Economic land concessions are large-scale industrial-agricultural plantations granted by the Government to individuals or companies to promote economic growth and increase employment in rural areas. The Sub-Decree on Economic Land Concessions states that economic land concessions of up to 10,000 hectares may be granted over land that has been registered and classified as State private land, provided the other prerequisites are also met. Legal prerequisites include among others: the registration of land as state private land; an approved land use plan; environmental and social impact assessments; public consultations; and solutions for resettlement issues. The sub-decree also stipulates that previously granted economic land concessions were be reviewed to ensure contractual compliance and solicit public comments.

In practice, poor enforcement of, and compliance with, the requirements of the Land Law and the Sub-Decree on Economic Land Concessions has not led to any systematic process of mapping, classification and registration of State land prior to the granting of economic land concessions. Concessions continued to be granted before determining whether the land is in fact State private land, privately or collectively owned or possessed. In general, most of the land conceded has not been registered or classified as State private land. Restrictions on the size and ownership of economic land concessions have not been properly enforced. Individuals have used different companies to acquire interests in multiple concessions, and to obtain adjacent concessions for the same purposes, circumventing the 10,000 hectare size limit. Concessions have been granted over forested areas and former forest concessions. Government authorities, who bear the responsibility of managing the concessions, have been implicated in illegal or coercive land concession awards.<sup>413</sup>

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<sup>412</sup> See World Bank, *Doing Business Reports* (2006) and (2007).

<sup>413</sup> See Cambodia Office of the High Commissioner for Human Rights (OHCHR), *Land Concessions for Economic purposes in Cambodia: A Human Rights Perspective* (2004); OHCHR, *Economic Land Concessions in Cambodia: A Human Rights Perspective* (2007).

### **3.     *Lack of Administrative Agency Adjudication***

With respect to administrative litigation, we find a strong, almost absolute, political resistance from the Government to allow administrative agency adjudication. Changes in economic policies that allocated extensive control rights to the state did not give way to greater accountability of the state and its agents to law. No administrative procedures were made available or put into effect thus frustrating the increasing demand by non-state agents to reduce the costs of state interference and assert their legal rights. Arguably the active use of market-allocative laws and rule-based procedures has a self-reinforcing effect for the further use of market-allocative law. Conversely the inability to enforce legal rights against the state discourages further administrative disputes.

Overall, the results of civil and commercial litigation on the one hand suggest some legal convergence with signs of increasing litigation with socioeconomic development and political change. On the other hand, the results of administrative litigations suggest some legal divergence as there is no movement or any substantial progress in that direction. To date we see no perceptible trend from discretionary to rule-based law as reflected in the establishment of legal procedures that allow non-state agents to hold the state as well as state officials accountable to the law. The lack of transparency of law and the unpredictability of administrative decisions have been a major problem for decades for the private sector.

#### **B.     *Legal Divergence at the Meso Level***

At the *meso* level legal divergence is reflected in the differences in the institutional environment - legal processes and legal institutions, in particular the role of courts and the legacy of a dysfunctional politically driven communist legal system; interference by the Executive; and the legacy of extensive transplantation of legal system from the West.

# ***1. Divergence in the Development of the Judicial System: Left over from a Dysfunctional Communist Legal System***

The judiciary is one of the main pillars of any legal system based on the rule of law. The presence of an independent, capable, and uncorrupted judiciary is the foundation of the Rule of Law and underpins the development of a market economy. In Cambodia, however, this is not the case. The judiciary is not equipped to assume its rightful role in a rule-based environment. Amongst the issues which are specific to the Cambodian judiciary are: judges' intellectual capacity, salaries, discipline, appointments and promotions, court organization, judicial procedures and infrastructure needs. Against this backdrop, any attempt to reform the judiciary is complicated further by the social context of years of war, internal struggles which have left deep psychological scars and underlying tensions.<sup>414</sup> Throughout the period, despite serious outcry from the private sector and the international donor community, judiciary reform seems to be the only area which has yet to see any sincere improvement.

Since 1979, the Cambodian court system has experienced many changes. From 1979 to 1985, there was only one court level, the provincial and municipal court, being the court of first and last instance. However, judgments rendered by that court could be reviewed by the Ministry of Justice and finally decided by the Council of State. In 1985, the Supreme Court was established and further changes in the court system was made with the arrival of the United Nations Transitional Authority in Cambodia (UNTAC). With the establishment of the Court of Appeal, a three-tiered court system was created: the Municipal and Provincial Courts with the first instance jurisdiction, the Court of Appeals, and the Supreme Court. Another exceptional jurisdiction includes the Military Court that handles cases related to military offenses.<sup>415</sup>

(a) *Lack of human resources:* Despite this institutional development, Cambodia's judiciary is seriously lacking in human resources. The shortage of lawyers meant that

<sup>414</sup> See Bit Seanglim, *The Warrior Heritage: A Psychological Perspective of Cambodian Trauma* (1991).

<sup>415</sup> For an indepth understanding of the current judiciary system, see Koy Neam, *Cambodian Judicial Process* (1998); Heng Vong Bunchhat, *Collection of Jurisprudence* (2000) [trans of: *Recueil Judiciaire et de Jurisprudence*]; Siphana Sok and Sarin Denora, *Legal System of Cambodia* (1998).

most judges appointed in the immediate aftermath of the Khmer Rouge regime were former teachers. Of the 120 judges who belong to the judiciary, only a handful of them have any proper legal qualifications. Prosecutors on balance possess even less legal education. Some twenty percent of the prosecutors have had some formal legal education, with fewer of them holding a full law degree. The judiciary's weak human resources are especially striking with regard to commercial cases. The level of experience among judges with commercial and financial law education is lower compared to those with criminal and civil law background. Judges regularly ask the Ministry of Justice (MoJ) for opinions, suggestions, or legal interpretations regarding cases.<sup>416</sup>

Perhaps the most salient characteristic of Cambodian judges is their link to the French civil law tradition where judges are, in many senses, bureaucrats. A new law graduate who wishes to be a judge can expect to be sitting on the bench as soon as he or she completes a training period and successfully passes an examination. This is because the judiciary, except at the highest levels, is just another civil service hierarchy in civil law countries. This is in sharp contrast with the anglo-saxon legal system; A law student in a common law country who gives any thought to becoming a judge one day is apt to consider even a lower court judgeship as something one might look forward to as a recognition of a long and distinguished career at the bar. In civil law systems, by contrast, a judicial career is just one of many options open to a beginner. Unlike the American judiciary whose judges are usually appointed from among experienced lawyers, a young judge enters at the lowest level and over time works up through a series of programmed promotions. Ordinarily, only positions on the highest courts are open to distinguished practitioners or professors as well as to career civil servants. On the debit side, however, it is frequently observed that civil law judges, because of their standardized training, tend to share a common outlook, and that their concerns about advancement promote a civil-service mentality which discourages initiative and independence. This centralized and self-contained system was, in fact, suitable to Cambodia's post-Khmer Rouge legal and political structure which, in the communist

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<sup>416</sup> See SPM Consultants, *Towards Legal & Judicial Reform: The Third Report of the Sida Advisory Team on Democratic Governance and Human Rights in Cambodia* (2002); See also previously cited USAID, *Southeast Asia Commercial Law & Institutional Reform and Trade Diagnostics: Cambodia Final Report*, above n 377.

tradition, depended on a cadre of judges who were loyal to the party and who understood their role in a larger bureaucracy.

(b) *Lack of financial resources:* The judiciary also suffers from a severe shortage in financial resources. The budget line for the courts falls under the MoJ. The MoJ itself received only 0.5 percent of total national budget and by implication, the budget for the judiciary represents a much lower amount. With the exception of earmarked budget allocations for some judicial institutions, such as the Supreme Council of Magistracy, the Supreme Court and the Appeal Court, the budget for the judiciary is placed under the Ministry of Justice. The salary scale for judges, prosecutors, and court officials is comparable to that of other civil servants, averaging around less than \$100 per month. Considering that low average monthly salary, it is not hard to imagine that corruption may be a significant factor in arriving at court decisions.

(c) *Gaps in judicial procedures:* Serious gaps in the judicial procedures - for example, the lack of modern rules of criminal and civil procedures - further provides an opportunity for judges to manipulate the system. Legal gaps and the mixed nature of the legal system tend to create some confusion in the application of relevant laws and procedures. The case of criminal sanctions used in Cambodia to punish the bouncing of checks shows that litigation rates for civil and commercial disputes alone may understate the extent to which formal legal institutions take part in enforcing private contracts. The other most controversial is the interpretation of the notion of breach of trust. Indeed, there is a disturbing confluence of criminal and civil procedures in many cases whereby a prosecutor may become involved if parties introduce a commercial dispute as part of a criminal case. The existence of criminal remedies with respect to commercial or civil issues - e.g., penalties arising from alleged breach of contract, considered a "breach of trust" - serves as a discouraging factor. The use of this charge tends to be based more on politics than law, but has occurred enough to be a damper on investment. The charge of 'breach of trust' was made famous when the court charged, convicted *in absentia* and sentenced to 18 months in prison Prince Norodom Ranariddh, son of King Norodom Sihanouk, President of the royalist party FUNCINPEC, and former President of the National Assembly. The court issued the verdict after it found the prince guilty of breach of trust over his handling of the USD 3.6 million sale of the Funcinpec's former

headquarters in Phnom Penh while he served as the party's president.<sup>417</sup> Despite pressures from the private sector to abolish this provision, Cambodia did not succeed to do it but instead continued its path of divergence from the legal development in the West and advanced Asian economies, where the role of criminal sanctions against economic misconduct has decreased substantially over time.<sup>418</sup>

(d) *Inconsistency in Sentencing*: Consistency in sentencing is one of the fundamental principles of justice. Court monitoring exercise has noted numerous examples of inconsistency in sentencing from judge to judge and from court to court. Since 2003 a "Court Watch Project (CWP)" was initiated with support from donors to contribute to better and more effective functioning of the Cambodian justice system. In 2005, the CWP undertook the monitoring of 8 courts focusing on criminal case hearings. From October 2004 to September 2005, 926 hearings were observed out of which 382 were felonies, 443 were misdemeanours and 101 were special offenses.<sup>419</sup> Inconsistency in sentencing makes it difficult for defense lawyers to advise their clients on the likely outcome of a case, and may contribute to a perception of the criminal justice system as arbitrary and unprincipled.

(e) *Delivery of Court Documents*: The delivery and accessibility of court documents<sup>420</sup> is another area of concern. Though written verdicts should be written immediately after the trials, in practice however it can take several days or even months. The delays affect the ability of the parties to draft their appeals, which must be filed within 2 months from the oral pronouncement of verdict. Further delays can occur in hearing the appeal due to delays in transferring the cases from the lower court to the Court of Appeals. Some transfers have taken even two years.

<sup>417</sup> See *Development Weekly* (Phnom Penh) 26 December 2006 – 8 January 2007. The IFC's Mekong Private Sector Development Facility, an operational arm of the World Bank Group is currently funding a project to analyze how widespread the problem is.

<sup>418</sup> For example, in Taipei, China from 1960 to 1987, postdated checks used as a substitute for security interests carried criminal sanctions if funds in the account were not adequate to clear the check. Formal and informal lenders used the postdated checks as security and as a security substitute. After criminal sanctions ended in 1987, banks applied their own sanctions jointly precluding new checking accounts for any depositor who defaulted on three promissory notes. See Kastharina Pistor and Philip A. Wellons, above n 70, 173.

<sup>419</sup> See Center for Social Development (CSD), *Annual Report Court Watch Project* (2005) 6. See also CSD, *Annual Report Court Watch Project* (2006) at <[http://csdcambodia.org/legalpub.html#CW\\_Bulletin](http://csdcambodia.org/legalpub.html#CW_Bulletin)> at 30 June 2008.

<sup>420</sup> Court documents include, among others, subpoenas, summons, detention or release orders, and verdicts.



There are also problems in delivering subpoenas, which result in witnesses failing to attend trial. In many cases, to expedite their trials, parties deliver the subpoena themselves. Judgments are not easily accessible. There is no official compilation of judgments available to the public. Although the parties to a case are entitled to a copy of the written judgment, free of charge, in some cases payment has been requested by court clerks.<sup>421</sup>

(f) *Weak judicial enforcement mechanisms/ execution of judgments:* By all accounts, the existing judicial process is painfully slow. Civil cases involving, for example, credit, security interests, and land disputes, could take years or longer to resolve through the courts. Cambodia lacks a functioning enforcement mechanism. There is an antiquate law on the enforcement of judgments issued by the courts and there exists no cadre of bailiffs. Enforcement falls formally under the responsibility of the prosecutors. However, due to excessive workload and lack of resources, enforcement is not prioritised.<sup>422</sup> Therefore, if an unsuccessful defendant, particularly a powerful one, refuses to comply with a court order, the successful plaintiff is left without recourse. Although the MoJ issued an order in 1997 empowering prosecutors to implement court decisions if requested by a successful litigant, inadequate security and police protection have contributed to the general unwillingness to enforce judgments as a matter of course. This has only exacerbated the public's lack of confidence in the judicial sector. The result is a system in which individuals are highly vulnerable to manipulation, misinformation, and procedural (and sometimes physical) abuse leading at times to violence.

## 2. *Interference by the Executive Branch*

Legal and judicial reform work in post-conflict Cambodia continues to suffer reversals, setbacks and failures due to some extent by gaps in judicial procedures but primarily by the constant interference by the executive branch.<sup>423</sup> The legal system has

<sup>421</sup> See CSD, *Survey Report on Freedom of Access to Information* (2004) 14.

<sup>422</sup> SPM Consultants, above n 416, 8.

<sup>423</sup> *Resolution adopted by the General Assembly on the Situation of Human Rights in Cambodia*, GA Res 58/191, 58th sess, 3rd Comm, UN Doc (A/58/508/Add.2) (2004).

not adjusted to accommodate the new market-oriented policies and to constrain the executive. Substantive laws and legal processes did not change along both allocative and procedural dimensions. Limited implementation of laws suggests the government retained substantial discretion in practice. Despite the constitutional guarantees of separation of powers and independence of the judiciary, judicial independence is often undermined in practice. The 1993 Constitution prescribes the separation of government into three mutually independent branches, the legislative, the executive and the judiciary. Article 128 of the constitution explicitly stipulates that "the judicial power shall be an independent power". Article 130 goes on to say that "judicial power shall not be granted to the legislative or the executive branches". The UNTAC law recognized the status of the judiciary as an independent body and international standards of justice were made applicable to the justice system. However, in the absence of detailed provisions for the appointment procedure and service conditions of judges and prosecutors, existing administrative procedures with powers vested in the Ministry of Justice were made applicable. This explains why in matters of regulation of service tenure, the Ministry of Justice continues to hold sway contrary to the basic principle of judicial independence. Judicial independence is threatened mainly by direct and indirect interference by the executive and powerful private entities. During this period, the executive tried to protect its asserted discretionary procedures by reducing the judiciary's power to enforce market-allocative law.<sup>424</sup>

The phenomenon of executive interference can be described as path-dependent and thus explained in a historical and regional context. As is the practice in other communist states, including Cambodia's former sponsor, Vietnam, the judiciary under the People's Republic of Kampuchea and the State of Cambodia was answerable to the Council of State. This line of command, implemented largely through heavy oversight by the Ministry of Justice, assured party and state control over all judicial decisions. This control was both informal and formal, as the Council of State officially reversed court decisions up through the late 1980s. Indeed, the concept of judicial "independence" was entirely unrecognized. It is not surprising, then, that the right to "appeal" was not fully implemented. Moreover, the Cambodian Supreme

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<sup>424</sup> The enforcement of land and forestry concessions disputes cases are obvious examples where the Executive has exercised strong influence on the judicial system. See 'Société Générale de Surveillance (SGS): Forest crimes remain rampant, court slow to prosecute illicit activities', *Development Weekly* (Phnom Penh) 29 August - 4 September 2005.

Court was technically established only in 1982 and was not actually active for several more years. The low priority placed on appeal was, in fact, suitable to a political regime unaccustomed to any sort of challenge. Only with the creation of the Court of Appeals in the 1990s was the judiciary reformed to provide litigants and defendants greater opportunities to appeal decisions.<sup>425</sup>

From a regional perspective, the influence of other more developed countries in the region, whose judiciaries are more advanced than in Cambodia, the Executive still exercises considerable control over the work of the courts. Singapore and Malaysia are only two obvious regional examples. It is probably not too farfetched to assume that the Cambodian government's view of the relation between the executive and the judicial branches is closer to the regional practice than to the situation in the Western world. That relation can somewhat sweepingly be described as resistance to, rather than acceptance of, a truly independent judiciary.<sup>426</sup>

Consequently, a better trained Cambodian judiciary would not necessarily be allowed to become more independent.<sup>427</sup> Instead of playing balance-of-power roles, the judiciary is firmly under the Government and the ruling party control. Though courts were seen as unfair in general, whether in political and nonpolitical cases, the judiciary was seen as a means for rapid political regimentation and public attitudes toward using the courts to resolve disputes were largely negative. Legal institutions and particularly the judiciary never tried to check the government's arbitrary use of its power or reverse its failure to carry out its duties. Rather the courts, overwhelmed by the political context of their actions, actually enhanced the executive's power in some

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<sup>425</sup> For a thorough overview of legal and judicial system of Cambodia prior to 1990, see Hedi Annabi et al, above n 173, 107-135.

<sup>426</sup> The use of legalism as an instrument of legitimisation can be generalised beyond Cambodia. In fact, there are important parallels in the Singaporean, the Chinese, and the Vietnamese context where law has been equally important as a tool of legitimisation and state-building. See, eg, John Gillespie, above n 363, 118-150.

<sup>427</sup> Dam argues that:

....Experience has demonstrated that an independent judiciary rests on a permanent corps of judges who can be removed only for cause..... A developing country, especially where political parties do not regularly alternate in power, would be well advised to adopt procedures and practices, such as life tenure, that encourage judges to be independent. It is generally thought that lifetime tenure is desirable for judges because it gives them economic security and frees them from undesirable pressures).

See Dam, above n 19, 113-114.

cases. In a few isolated cases, judicial activism was put to the test and lost during this period, further strengthening the already substantial discretion of the Executive.<sup>428</sup>

In general, efforts by the Executive to influence judges became a fait accompli well known to the public. As a matter of practice, judges buy their jobs and solicit significant bribes by selling judgments when the state is indifferent to a result. However, it is generally accepted that when the regime perceives a threat or opportunity, judicial decisions are dictated by senior regime leaders.<sup>429</sup> The miniscule size of the legal community is another factor facilitating the control by the Executive. There are only about some 100 judges, 100 prosecutors and 350 private attorneys.

In general, the Executive involves itself in the judiciary in more and less direct ways.

(a) *First*, interference with the Judiciary was explicitly incorporated into the organic laws of key institutions such as the Supreme Council of the Magistracy (SCM)<sup>430</sup> and the Council on Legal and Judicial Reform. The undue interference in the governing of the Bar Association was less explicit. Under the Constitution, the SCM is mandated to advise the King on measures to safeguard the independence of the judiciary as well as matters of appointments and promotions. The SCM is also responsible for maintaining discipline amongst the judicial staff. In reality, the SCM has little power to appoint or terminate; judges are self-selected for all practical purposes, many of them having bought their positions from the first place. The SCM accedes to appointments decided internally by the ruling party leaders. Moreover, the SCM Law on its face appears inconsistent with both the letter and spirit of the Constitution. The prominent role given to the Minister of Justice in the constitutional body charged with overseeing the Judiciary would appear to violate the separation of

<sup>428</sup> The following anecdote is typical: Following the launch of an emergency campaign to reform the judicial system by the Prime Minister, a provincial court took action to re-arrest five criminals who admitted paying bribes in return for their freedom and convicted seven corrupt court officials involved in the scheme. A year later when public opinions died down, another judge acquitted all seven court officials convicted of bribery. See *Development Weekly* (Phnom Penh) 1 - 7 May 2006.

<sup>429</sup> Congressman James Leach, chairman of the House International Relations Subcommittee on Asia and the Pacific described systematic efforts by the ruling coalition of the Cambodia People's Party (CPP) and former Royalist opposition party FUNCINPEC to pressure judges and prosecutors and to use the courts to harass government critics and members of opposition political parties. See 'Lawmaker Concerned by Threats to Basic Freedoms in Cambodia' (Press statement, U.S. Department of State, 31 October 2005). <<http://www.america.gov>> at 30 June 2008.

<sup>430</sup> *Law on the Organization and the Functioning of the Supreme Council of Magistracy 1994.*

powers provisions of the Constitution.<sup>431</sup> In its present form, however, the SCM is perceived as being too dependent on the Executive and has been largely ineffective in enforcing discipline amongst judges and magistrates. The report of the Special Representative of the UN Secretary General for human rights states:

“...that the Supreme Council of Magistracy, the constitutional organ charged with protecting the independence and professional integrity of judges, including prosecutors, is widely acknowledged to be unable to carry out its role credibly and effectively..... The Council requires wholesale reform, in line with the constitutional principle of separation of powers, so that its composition represents the judicial profession free from political influence. It is difficult to see how the independence of judges can be guaranteed when their regulatory body includes in its ranks one government minister ex officio and one member of the permanent committee of the ruling party.”<sup>432</sup>

(b) *Second*, the appointment of judges was heavily politicized. Appointments are often made on the basis of considerations, which have little to do with either the qualifications or the merits of the individuals. All too often, some active judges work within the Ministry of Justice after their removal from their posts due to complaints of serious misconduct. Their presence within an Executive branch institution seems incompatible with the constitutional notion of a separation of powers, and represents an example of the blurring of roles in Cambodia's judiciary system. There is also no legal provision to distance judicial personnel from political affiliation. It is not surprising, therefore, that many judges and prosecutors are suspected of bias, at best, in favor of the government and its senior officials. That said, Article 15 of the Law on Political Parties unfortunately does allow all officials, judges and prosecutors to be active members of political parties and to organize political activities within their own institutions.<sup>433</sup>

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<sup>431</sup> For example, Article 6 of the SCM Law states that the Minister of Justice shall issue a regulation setting out the procedures and organization of the election of judges to the SCM, while Article 7 makes the Minister the primary convener of SCM meetings.

<sup>432</sup> See Human Rights Council, *Implementation of General Assembly Resolution 60/251 of 15 March 2006 entitled “Human Rights Council”: Report of the Special Representative of the Secretary-General for human rights*, Yash Ghai, GA Human Rights Council, 4th sess [ 9], A/HRC/4/36 (2007).

<sup>433</sup> The behind the scene influence and power of a political party leader or representative within a particular ministry or government institution is far reaching despite sometimes his or her lower rank in the civil service hierarchy.

Although the Constitution states that rules governing judges, prosecutors, and the functioning of the judiciary shall be defined in specific laws, no such laws have been enacted in the fifteen years since the establishment of the Constitution. Although a Law on the Status of Judges and Prosecutors was called for in the 1994 and 1995 national development programmes, no concrete steps were taken to adopt this law. A draft law has been in existence since 1993 and in 1999, a revised draft Law with 18 Chapters and 101 Articles was produced by the Government for limited circulation. In spite of numerous statements of commitment over the years by leading members of the Executive, the law has still not been submitted to the National Assembly. In the absence of a law governing appointments and promotions in the judiciary, there are no known criteria to regulate the conditions for appointment, terms of employment, and dismissal of Cambodian judges. Such a law, essential to ensure the independence and effective functioning of the judiciary, should aim at establishing a judicial service tenure system with a clearly defined salary structure, an appointment process with clear service conditions and benefits, codes of conduct.<sup>434</sup>

(c) *Third*, the annual budgets of the SCM and courts are allocated from the budget of the Ministry of Justice which make them completely dependent upon the Ministry.

(d) The *fourth* element of interference relates to the issue of impunity.<sup>435</sup> Up until 1999, thanks to Article 51 of the Law on the Statutes of the Civil Service which required that permission to arrest a civil servant be obtained from their supervisors prior to arrest, government officials, including all civil servants, police, and the military, enjoyed an effective immunity from criminal prosecution. Permission to arrest and prosecute was rarely given, and only in exceptional cases that had already received substantial public attention.

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<sup>434</sup> Dam argues that:

Part of behavioral independence resides in the judge as a person: is a judge able to be dispassionate and free from bias, able to resist political pressures and the temptations of corruption, and so forth? In most societies those are not just questions of upbringing and morality. The answer also depends on the judges' economic security, place in the society, education, and career experience.

See Dam, above n 19, 112.

<sup>435</sup> For a thorough records of patterns of impunity since the Paris Peace Agreements See OHCHR, *Continuing patterns of impunity in Cambodia* (2005). The report relies primarily on the reports of the Secretary-General's Special Representatives for human rights in Cambodia to the General Assembly and to the Commission on Human Rights. The report can be found at <[http://cambodia.ohchr.org/download.aspx?ep\\_id=242](http://cambodia.ohchr.org/download.aspx?ep_id=242)> at 30 June 2008.

The amendment of Article 51 abolishes the prior approval requirement for the arrest of an official and requires only that department heads to be notified within three days of charges being filed against an official in their department. If a civil servant is arrested or detained, the judge or prosecutor must immediately notify the head of the institution concerned. While Cambodia's culture of impunity stems not only from provisions like Article 51 but from a larger inability to prosecute individuals with power, position, or status, the amendment of the said Article facilitates, in principle, prosecution of officials for wrongdoing and should therefore be regarded as a small but positive step in the judiciary reform.

Although still strongly politicised and widely criticized by the public, the SCM has during the last few years started to assume its oversight role of the judiciary more actively than before. Credibility of the SCM got a boost with the new King Norodom Sihamoni took on the task of chairing the first meeting of the SCM on 11 July 2005 to enact judicial reforms and sanction court officials involved in corruption. The King and the nine SCM members voted to reshuffle a fourth of the country's judicial officials to help eliminate corruption. A Royal Decree of 28 December 2005 effectively rotated 23 judges, prosecutors, deputy prosecutors, court directors and court deputy directors from one part of the country to another.<sup>436</sup> When judicial corruption became an issue high in public opinion polls the Government and the SCM took actions leading to remarkable results. Reportedly, more than 200 cases since 1998 are being examined for possible corruption by court officials. The Minister of Justice suspended both the Chief Judge and Chief Prosecutor of the Phnom Penh Municipal Court pending completion of the investigation, and subsequently, the CSM authorized the permanent removal from their court functions. Separately, the SCM has received complaints on cases of alleged judicial misconduct by 28 judges and prosecutors in 12 different provinces.

(e) *Interference in the Bar Association:* The independence of lawyers is essential to the right to an effective representation guaranteed in the Constitution. In

<sup>436</sup> See, eg, 'Supreme Council of Magistracy and King Sihamoni reform judicial system and attack corruption', *Development Weekly* (Phnom Penh) 18 – 24 July 2005; 'Court officials reshuffled to prevent corruption', *Development Weekly* (Phnom Penh) 16 - 22 January 2006; *The Cambodia Daily* (Phnom Penh) 9 January 2006.

accordance with the due process guarantees, the Government has a duty to ensure that lawyers are able to perform their professional functions without intimidation, hindrance, harassment or improper interference, free from the threat of prosecution or other sanctions. For that purpose the Bar Association was created by law in 1995 to regulate the legal profession as “an independent and autonomous profession”. However, the independence of the Bar is widely perceived as having been compromised in recent years. The appointment of senior government ministers to the Bar in 2004 and 2006, notwithstanding their lack of requisite legal qualifications, has undermined the reputation and integrity of the Bar Association as an independent institution.

Elections for the Bar Association’s presidency and the Bar Council have become highly politicized. For two years the Bar has been incapacitated by political infighting between the two rivals for the post of President of the Bar.<sup>437</sup> Elections in October 2006 ended a dispute in favour of the Acting President, who was widely perceived as the government candidate. Highly questionable criminal charges of forgery, which carry a prison sentence of up to 15 years, remain pending against several, now former, Bar Council members who resisted the politicization of the legal profession.

### 3. *Legacy of Legal Transplant from the West*

Another major cause for the divergence of the Cambodian legal system lies in the differences in the institutional environment. The formal court system as it exists in Cambodia today is the result of two equally important factors: the left-over from a dysfunctional politically driven communist legal system and the legacy of extensive transplantation of legal systems from the West.

Legal processes and legal institutions, in particular the role of courts, have played a mixed role in Cambodian economic development with the legal transplant accounting for some of the differences we observe. Cambodia had a strong Buddhist tradition, according to which law is an undesirable, but necessary, instrument for upholding

<sup>437</sup> Donors (JICA, France, the United States, Canada, the United Nations Human Rights Commission (UNHCR) and NGOs expressed concerns over the crisis and regretted the negative impacts on Cambodia’s judicial system and the partisanship in the CBA. See *Development Weekly* (Phnom Penh) 7 – 13 August 2006.



order, rather than a source of legal rights. Law was used as an instrument for upholding order and it left ample discretionary power for the state to do so. Legal transplant of an entire legal system to a country with a very different cultural, economic, and socio-political background did not come without a cost. Utilitarian use of foreign law has also caused distortion and difficulties. Transplanted laws were not easily internalised by the Cambodian courts, thus explaining why many laws remained dormant on the book for many years.

Most legal comparativists are of the opinion that the Cambodian legal system blends together several important legacies of the three major legal traditions in the modern Western world: the Romano-Germanic civil law tradition; the socialist law tradition; and the Anglo-saxon common law tradition. Just as ancient Roman law had been introduced into the conquered territories of a vast empire, the legal influence of the French Civil Code was brought, in the colonial era, to Indochina. The Soviet system, being the oldest national legal system within the socialist legal family was imposed on older socialist countries in the post cold war era like Vietnam, Cambodia, and Laos. The Anglo-American common law tradition made its influences in the pre 1975 period and recently in the pre-ASEAN membership period.

The Cambodian judiciary is thus shaped by these major historical traditions or events. Ruled as a French protectorate until 1953, Cambodia developed a legal and judicial system based almost entirely on that of France. The influence of France extended not only to the laws imposed on the protectorate prior to independence but on the legal educational system offered to the Cambodian elite.<sup>438</sup> The development of Cambodian lawyers, prosecutors, bureaucrats, and, of course, judges, who were familiar with this system assured that, after independence, the legal system and judiciary remained firmly steeped in the French tradition. Despite the overthrow of the monarchy in 1970, the genocide of the Khmer Rouge from 1975 to 1978, and a dozen years of Soviet-style communism, much of the French tradition survives. This continuity is based partly on inertia, partly on the efforts of the handful of jurists who survived the Khmer Rouge, and partly on the decision of post-Khmer Rouge communist leaders to

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<sup>438</sup> See Ayres, above n 38. Ayres shows that Cambodia's educational dilemma – the disparity between the education system and the economic, political, and cultural environments, which it should serve – can be explained by setting education within its historical and cultural contexts.

retain those elements of the French tradition which are compatible with the principles of communist governance.

Despite the devastation committed by the Khmer Rouge, a semblance of a legal system began to re-emerge in 1979, this time under the influence of the Communist/Socialist tradition. The legal system functioned largely immune from either domestic or international scrutiny. By law and in practice, the system functioned to guard the interests of the state and the party at the expense of individual rights. Adopted laws were clearly inspired from the socialist planned economy model. Lawyers per se did not exist. Rather, following the Vietnamese model, administrative cadres representing the state (and hence, the interests of the people) appeared as proxies for the accused. Defendants were summarily found guilty and sentenced to corresponding periods of incarceration or punishment.<sup>439</sup>

With the advent of the UNTAC, transplanting foreign laws and assimilating Cambodian law to international practices started immediately. Cambodian law-makers faced with the more pressing tasks of building a new legal system and making laws almost out of nothing willingly accepted the suggested uses of foreign legal terminologies, structures, and methodologies at an unprecedented pace. During the period, the United Nations Electoral Law and the annexed Code of Conduct was passed along with other regulations such as the Provisions Relating to the Judiciary and Criminal Law and Procedure Applicable in Cambodia during the Transitional Period, and the 1993 Law on Criminal Procedures. The Supreme National Council (SNC) has also acceded to various other international instruments including the 1992 Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

Legal transplant of entire legal system to a country with a very different cultural, economic, and sociopolitical background did not come however without a cost. In a confidential memo to his superior a UNTAC legal expert stated:

...While I do not disregard the obvious importance of ensuring that laws and regulations are put in place during the transitional period, in order to ensure the establishment of an environment

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<sup>439</sup> See Hedi Annabi et al, above n 173, 124-126.

conducive to the holding of free and fair elections, I am of the opinion that our good intentions may be defeated by the very inadequacy of the measures we take and the unacceptable or inappropriate laws and regulations we may, as a result, propose to, or impose on, the people of Cambodia in complete or partial disregard of the laws and regulations already in existence in the country and within the existing administrative structures, which laws and regulations it is our duty to study, analyze and make proposals for reform or amelioration, if necessary, to fit with the purposes and objects of the Paris Agreement..... This, in addition, has brought about the increasing perception that UNTAC is assuming colonial-like functions in this country by acting in disregard of the fact that laws and regulations existed here prior to her arrival.<sup>440</sup>

Following the dismantling of the Khmer Rouge military regime, fundamental legislative and regulatory measures were continuously adopted to transform the Cambodian society into one that is non-military and into one where peace and order prevail. The decade was marked by the emphasis on legal and judicial reforms as an important component of the country development agenda, and by the various economic reforms driven by Cambodia's process of accession to the WTO. The reforms were undertaken to foster development of an emerging private sector, and to respond to the requirements of the regionalization and globalization of world trade.<sup>441</sup>

To support the market-based policies and the new development strategy, the Government passed new substantive laws and modified existing ones to render them more market-allocative. The large number of laws passed during the period were building blocks for the return of the rule of law and democracy. They were mainly organic laws establishing a functioning administration, laws related to fundamental human and citizen rights, freedom and the principles of democracy. Other laws and regulations enacted or passed were related to economic development and aimed at providing a fair and predictable business environment.<sup>442</sup>

The transplant of judicial procedure codes was unfortunately limited to a transfer of formal rules and institutional structures without a corps of well-trained legal practitioners. Its courts were staffed with personnel trained domestically and often ill-

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<sup>440</sup> Ngongi, above n 42.

<sup>441</sup> For a policy analysis of Cambodia's accession to the WTO see Sok, above n 131. See also Sok Siphana (ed), Cambodia Country Case Study of WTO Implementation: Final Report (2003).

<sup>442</sup> See Chapter III for an analysis of the legal development during the various policy periods: See also Annex II for a chronology of legal and regulatory enactments.

equipped to deal with issues related to market transactions. The matter was further compounded with the near total depletion of judges and court staff killed during the genocide regime.<sup>443</sup> The legal and bureaucratic corps that practised and enforced law during the socialist regime which followed were appointed more on the basis of political affiliation than legal merit, many of whom barely had any training in law.

The process of legal transplanting to Cambodia was further underscored by the difference between the common law and the civil law system as reflected in the different role the judiciary has traditionally played in common law as opposed to civil law economies. In common law countries the judiciary is vested with the power to make new law by way of establishing precedents, while its role in civil law countries tends to be confined to interpretation. Cambodia did not inherit the relevant institutional and procedural infrastructure for extensive judicial review from the French romano-germanic legal system, a factor which further aggravated the works of legal practitioners trying to interpret the complex web of old and new laws.

Cambodia's legal framework suffered from a serious lack of coherence. As in other countries with a civil law system, legislation is the primary source of law in Cambodia. Other sources of law include the Constitution, international treaties ratified by Cambodia, government decrees and regulations, regulations adopted under the United Nations Transitional Authority, as well as customary laws. According to the 1993 Constitution, previously passed laws remain in effect to the extent they do not contradict the new Constitution. As such, Cambodia's current legal system could comprise French-style laws adopted prior to 1956, as well as laws subsequently passed under various governments. Since 1993, many new laws have been passed to support the emerging market-based system, and more laws are in the pipeline with respect to Cambodia's commitments to the WTO. As there is no uniform interpretation of the abovementioned constitutional provision, there is often confusion as to the extent to which different old laws apply. As new laws are passed, ensuring

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<sup>443</sup> During the years 1975-79 the Khmer Rouge regime carried out the summary execution of educated persons, judges and lawyers were no exception. Of the 500 or so judges and lawyers living in Cambodia in the pre-1975 period, at least half and probably more than 80 percent were killed or died of starvation and disease. The director of Phnom Penh University's Faculty of Law was among the 20,000 people known to have been tortured and executed at the notorious S-21 or Tuol Sleng interrogation center in Phnom Penh. See Chandler, *Voices from S-21: Terror and History in Pol Pot's Secret Prison* (1999).

consistency between the old and new laws will represent a major challenge for Cambodia.

In the course of the legal transplant process, Cambodia has been constantly a battleground for nationalistic legal interests, where various donors have used the opportunity to promote their own particular legal solution. International assistance to the legal and judiciary reform process has been and remains fragmented and uncoordinated. While most donors gave lip service to the concept of consultation and coordination among themselves and with the Government, their own agendas and internal incentive structures and objectives became sometimes the source of conflict. Donor coordination is always difficult, since each organization operates on a different timetable, with different political pressures from their home countries or boards of directors. Institutional incentives that shape the behavior of professional staff seldom encourage spending significant time on coordination. Moreover, holding the Government accountable through conditionalities also implies the willingness to withhold or delay funding, a position which is often a difficult decision. As the direct recipients of donor largesse, ministries and Government agencies, once they have established important funding and technical assistance relationships with certain donors, jealously guarded their turf. As a result, on top of its own legal legacy inherited from earlier political systems, Cambodia finds itself struggling with a newly imposed heterogeneous and confusing complex of laws and draft laws, representing a number of ideologies and legal systems.<sup>444</sup> For over a decade long, donors are divided on whether the court and the legal system should be based on a civil or common law system rather than looking at similarities and complementarities to improve the current legal system.

The development of the draft Criminal Code and the Code of Criminal Procedure is a typical example of the coordination and coherence problem: Both drafts were identified as priority laws in 1994 when a first preliminary draft of the Criminal code was prepared by a French legal expert. Between 1995 and 1996 a US legal expert tried to improve the old draft Criminal code. In 1997 a French legal expert was engaged by the UNHRC at the request of the Ministry of Justice to assist in the

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<sup>444</sup> See Annex 6.1 for an extra-ordinary effort by a donor to transplant a law in Cambodia.

drafting of the Code of Criminal Procedure. In 1999, the French Government, in cooperation with the Ministry of Justice, finally decided to take up the task of codification. Preliminary draft codes were completed by French legal experts in September 2000 and were reviewed by the Ministry of Justice's working groups. Two working groups of NGOs have made comments on the drafts and submitted them to the Ministry of Justice's working groups for consideration. As of 2007 the saga continued with no end in sight.

Lastly, the striking feature of the Cambodian experience demonstrates that conversely, legal forms do not automatically result in economic development. New law offers a potential whose realization depends on many other factors. The infusion of Western law to Cambodia would seem to have given the Cambodian economy a head start toward economic development, but it proved to be insufficient. The history of legal transplant in Cambodia showed that most of the laws were left unenforced for years after they had been enacted. In other cases, environmental protection and intellectual property rights legislation passed to comply with international treaties also tended to be weakly enforced. A turning point in the enforcement of these recent legal transplants was when domestic interests called for the enforcement of these laws.<sup>445</sup> Even then, the effectiveness of law enforcement often was diluted by political interference. Moreover, the shortage of Cambodian legal experts has meant that much of Cambodia's existing legal evolution has been heavily influenced by international experts from different legal background. This situation has created a range of inconsistencies in legal interpretations which furthermore make enforcements difficult.

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<sup>445</sup> There is some parallel of the Cambodian experiences with other countries as well. Pistor and her colleagues found that in some countries transplanted law has remained without influence for decades in the face of rapid economic change. In other countries, they found, the institutional base for adapting the law to changing realities was not present. And in some countries transplanted laws were changed erratically, sometimes in a retrogressive fashion, because the legal profession and lawmakers had so little knowledge of or experience with the legal field involved. In short, transplanted laws often do not operate in the host country the way they do in the home country." Pistor et al, 'Evolution of Corporate Law and the Transplant Effect: Lessons from Six Countries' (2003) 18 (1) *World Bank Research Observer* 97-108.

### **C.     *Legal Divergence at the Micro Level***

At the *micro* level, legal divergence took place both from the demand side as well as from the supply side.

#### **1.     *Factors of Divergence from the Demand Side***

The demand for legal and judicial services, though on the increase, remains weak. One reason is that some one-third of Cambodia's population is functionally illiterate and poor. Aside from their general inability to pay for the reasonable cost of services, let alone rents in addition, there exists a widespread perception of the need to engage in corrupt activity to obtain the delivery of court services. A survey result released as part of Transparency International's "Global Corruption Barometer" reveals that 72% of Cambodians reported paying a bribe to receive a public service within the last year. This is by far the highest percentage in the Asia-Pacific region and second to only Cameroon (79%) internationally. The judiciary and the police were viewed as the most corrupt institutions by all income groups as well as all localities (urban, rural, and remote). Nearly half (45%) of respondents that came into contact with the legal system within the past year, paid a bribe and 62% paid a bribe to the police within the same period.<sup>446</sup> Moreover, there is extremely low public and private sector understanding of, let alone confidence in, the legal and judicial system due to the difficulty of gaining access to even basic legal texts and physical access to court facilities.

Access to justice for the majority of Cambodians - particularly the rural poor, indigenous groups and women, is severely restricted.<sup>447</sup> Although a system for legal aid was introduced since the early 1990s, the scope of their services remained limited. A few NGOs stand out in terms of their commitment and quality delivery to assist the poor, notably Legal Aid of Cambodia (LAC) and the Cambodian Defenders Project (CDP). For example, since 1995, LAC has provided the poor with free legal services

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<sup>446</sup> See Transparency International, 'Cambodians Do Not Think Corruption Will Decrease' (Press Release, 20 February 2008).

<sup>447</sup> UNDP, *Pathways to Justice*, above n 276, 174.

in 6,639 criminal cases and 1,956 civil cases.<sup>448</sup> In recent years the efforts are joined by the Cambodian Bar Association and the legal group *Avocats Sans Frontières France* (ASFF) which provided practicing lawyers to 20 provincial courts to provide free legal services.<sup>449</sup>

Access to, and dissemination of, legal information is affected by structural deficiencies (e.g. limited broadcasting and public access) and most of the time by lack of funds. There are no guidelines for when and how the courts or public bodies should give out information. Procedures to acquire information is so arbitrary and often information that should be available to people free of charge is accessed only after payment. Moreover lack of, or inefficient, procedures in the judiciary ensure that reports of investigating judges and trial court judgments are difficult to access, or are not accessible at all. Despite the UNTAC code which provided lawyers with the legal rights to access a client's files and information from the courts, most lawyers still claim to encounter problems when asking for information.<sup>450</sup> Due to the difficulties arising from obtaining the required information, there is a perception shared both by individuals and businesses that fair and impartial resolution of their grievances through the formal court system cannot consistently be attained.

In the Legislative branch, draft laws scheduled for debate in Parliament are not openly distributed. Even journalists have difficulties accessing systematically various legal texts. Only a few draft laws or proposed laws were arranged for public hearing by various parliamentary commissions giving opportunity to civil society to contribute their opinion, and even then only a few recommendations presented by civil society were integrated into those draft laws.<sup>451</sup>

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<sup>448</sup> See 'Legal Aid of Cambodia helps poor clients with 8,000 cases amid corrupt judiciary system for 10 years' *Development Weekly* (Phnom Penh) 18 – 24 July 2005. For the background of the birth of legal aid in Cambodia see Francis J. James, 'Justice and Law Reform in Cambodia: Building a Legal Aid Consciousness from the Ground Up', (Conference Paper presented at The Role of the UN in Peace-Building and the Development of Democratic Governance in Cambodia: Past, Present, and Future, Glenn Cove, NY, 1-3 November 2005).

<sup>449</sup> See 'Project provides legal aid for poor provincials', *Development Weekly* (Phnom Penh) 15 - 21 May 2006.

<sup>450</sup> See Center for Social Development (CSD), *Survey Report on Freedom of Access to Information*, above n 421.

<sup>451</sup> Of the nine parliamentary commissions, the Second Commission on Economy, Finance, Banking and Audit seems to be more pro-active in engaging external stakeholders. The Commission has published 3 Volumes of the Parliamentary Documents containing various draft legislations and supporting documents.



## 2. *Factors of Divergence from the Supply Side*

Cambodia's judicial system is plagued with problems and is regularly identified as one of the most corrupt institutions in Cambodia.<sup>452</sup> Several problems and deficiencies of the judicial system were raised, including the increasing volume of court cases, excessive pretrial detention, trial in absentia, problems of judgement writing and enforcement of judgements, and lack of material and infra-structural facilities. Acute human and financial resource constraints, the adverse influence of powerful people on the courts, non-compliance or disrespect of court orders by law enforcement authorities, and inadequate laws to guarantee the independence of the judiciary were among the factors of divergence.

(a) *Lack of human resources:* Cambodia has today roughly 200 judges and prosecutors altogether. Even though judges and prosecutors have different responsibilities, the word *judge*, as it is used in a general sense as a title in the Cambodian judicial system, refers not only to judges who sit at trial but also to those who hold the position of prosecutor. A judge involved in a trial or investigation is called a *sitting judge* (*chaokrâm ângkuy*). A judge who holds a position in the prosecution department (*ayakar*) is called a *standing judge* (*chaokrâm chhor*). A *sitting judge* can be a *standing judge* during his or her career in the court and vice versa. Both types of judges have equivalent rank in the civil service.<sup>453</sup> Less than 50% have finished high school, and no more than approximately one third has some kind of legal education. In the early 1980s, the PRK regime selected its judges from among teachers, soldiers, and other persons with no legal background. Trained for a few months by the few surviving jurists and by Eastern European advisors, they assumed their positions on the bench.<sup>454</sup> Some judges kept their positions during the UNTAC period and remain in their positions to date. Subject to oversight by the Ministry of

<sup>452</sup> The findings from numerous surveys undertaken over the last decade by various organizations were consistent when it comes to the corruption of the judiciary. See, eg, World Bank, *Cambodia Governance and Corruption Diagnosis: Evidence from Citizen, enterprise, and Public Official Surveys*, above n 136; Calavan, Michael, Sergio Briquets and Jerald O'Brien, *Cambodian Corruption Assessment* (2004); Center for Social Development, *Survey Report on Freedom of Access to Information*, above n 421; International Republican Institute (IRI), *Survey of Cambodian Public Opinion* (2007).

<sup>453</sup> See Koy, above n 415, 24.

<sup>454</sup> Generally little information is available about the education of Cambodian judges other than the fact that most received law degrees from the former Soviet communist bloc — East Germany, Russia, Kazakhstan and Vietnam — where carrying out the State's wishes counted more than impartiality.

Justice, they have struggled to resolve criminal cases as well as family, land, and other basic civil cases. Most of judges lack the necessary training and experience, especially to resolve commercial disputes. For some years, some UN agencies ran a "mentor program" by bringing in judges from other countries to serve as advisors to the local judges. This, compounded by a lack of even basic legal texts, has led to an uneven application of the law by judges and thus, on this score alone, less than predictable judgments. Against this background, the recent appointment of 30 young law graduates, who have been trained in Russia and Eastern Europe, represents a positive development. There is a strong need for judicial training to raise the capacity of existing and future judges. Although the process will be lengthy, this will ultimately improve the overall quality and predictability of judgments in Cambodia.

(b) *Limited financial resources:* Last, the judiciary does not have a separate and adequate budget, allocated and disbursed in a timely manner, to ensure the payment of adequate salaries, to conduct field investigations, and to provide for day-to-day operational costs of the justice system, including the building and maintenance of proper court facilities.<sup>455</sup> The problem of under-funding of the criminal justice system is particularly noticeable in the area of defense representation. Despite the statutory requirement to provide defense counsel for the poor, in many instances juvenile defendants and adults charged with felonies were not represented by a lawyer. In four courts monitored by CWP during 2006, the findings are astonishing: out of 1491 trials monitored, 55% of all defendants were unrepresented, 29% of defendants charged with felonies had no defense lawyer, and 31% of juveniles who appeared before the courts of first instance had no legal representation.<sup>456</sup> The lack of financial resources is obvious with regard to absence of legal tools in the work of the judiciary. Many judges do not have access to the laws that they are supposed to apply. Furthermore, rulings by the Supreme Court are not published and distributed to the lower courts.

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<sup>455</sup> Compare the special Cambodian court, formally known as the Extraordinary Chambers in the Courts of Cambodia (ECCC) which oversees the trials of some 10 surviving Khmer Rouges leaders with a budget of USD 56 million over a three years period (nearly USD 20 million annually) and the normal Cambodian court system with an annual budget of USD 2 million for 23 courts nationwide.

<sup>456</sup> See CSD, *Annual Report: Court Watch Project* (2007) 11. See also CSD, 'Condemns Trials in Absentia: 34% of 740 Defendants is a Gross Violation of Due Process' (Press Release, 13 June 2007).

The unrealistically low salaries of judges and court officials made them all the more susceptible to the lure of corruption.<sup>457</sup>

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<sup>457</sup> Although the salaries of judges and prosecutors have been increased considerably in recent years, the salary of court clerks remains very low – they receive only around USD 100 per month. Judges and prosecutors now receive USD 375 – 625 per month, depending on their position.

## **CHAPTER VII:**

# **INSTITUTIONAL DIVERGENCE**

## Chapter VII:

### Institutional Divergence

#### I. INSTITUTIONS AND INSTITUTIONAL CHANGES IN ECONOMIC DEVELOPMENT

##### A. *New Institutional Economics*

Historical research about institutions and institutional changes, the so-called new institutional economics, attributed the underdevelopment of many economies to their governments' inability to create market supporting institutions.<sup>458</sup> Markets, for them to function, required a framework of rules, in particular effective codes of criminal and business laws, upon which market actors could rely - to enforce property rights and contracts, to govern business enterprises, and the like. A modern economy requires well functioning formal (or governmental) institutions. Institutions are the formal and informal set of laws, systems, and procedures, organizations, rules, and codes that shape behavior. Douglass North was clear that in emphasizing institutions, he was not talking about organizations. Institutions are the "rules of the game," and therefore include "any form of constraint that human beings devise to shape human interactions." They include not just law but social norms, customs, and unwritten codes of conduct as well as formal and informal enforcement measures. Organizations, in contrast, include every way in which "individuals bound by some common purpose to achieve objectives" organize themselves, from governments through political parties, economic, social, and educational bodies.<sup>459</sup>

According to new institutional economics, a country which can develop such formal institutions can grow.<sup>460</sup> For example, if it can create a court system which promotes the implementation of contracts, the cost of transactions will decline, and the volume

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<sup>458</sup> See Adam Smith, *The Wealth of Nations* (1776), Book IV, Chapter VII which contains a prescient assessment of institutional differences among countries and their implications for subsequent development. For more recent works, see David Landes, *The Wealth and Poverty of Nations: Why Some Are So Rich and Some So Poor* (1998).

<sup>459</sup> See North, above n 29, 4, 6.

<sup>460</sup> The literature on transactions costs, initiated by Coase in the 1930s, is vast. Coase's most important message, one with profound implications for restructuring economic theory, is that when it is costly to transact, institutions matter. See Ronald Coase, *The Problem of Social Cost* (1960) and *The Nature of Firms* (1937).

of transactions will expand. But if it cannot create such a system, the ability to conduct transactions will be limited to those who have proven to be creditworthy, which will, in turn, limit the potential of transaction increase.

Transaction costs might appear in various forms, most typically as problematic institutions - that is, as defined by Douglass North, the rule of the game.<sup>461</sup> North argues that the nature of institutions depends on what kind of rules the government makes and how the government enforces them, in particular those that affect the cost of transactions. The lower the cost of transactions, the greater the volume of economic transactions. The greater the volume of transactions, the greater the volume of production leading therefore to higher economic growth. North concludes by speculating about the central issue of economic history:

....Institutions determine the performance of economies..... The security of property rights and the development of the public and private capital market were instrumental factors not only in England's subsequent rapid economic development, but in its political hegemony and ultimate dominance of the world. England could not have beaten France without its financial revolution; the funds made available by the growth in debt from 1688 to 1697 were a necessary condition for England's success in the ongoing war with France as well as in the next one (from 1703 to 1714) from which England emerged the major power in the world.<sup>462</sup>

Similarly, the exponents of the 'rational choice theory' perspective seek to place emphasis on the importance of legal institutions, and institutions in general, by allowing governments credibly to commit to upholding property rights. Thus, we find rational choice institutionalists claiming that successful long-term economic growth requires incentives for political as well as economic actors to desist from rent seeking.<sup>463</sup> From this perspective, institutions reflect the rise and success of commercial minded interests whose primary aim lies in the establishment of a set of institutions that restrict the ability of rulers to engage in predatory and rent seeking behaviour. Consequently, a credible legal framework that guarantees property rights becomes a central element of this institutional ensemble that provides a kind of backing for the market participants on centre stage.

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<sup>461</sup> North, above n 29, 4, 6. See also Dam, above n 19, 22.

<sup>462</sup> Ibid, 139.

<sup>463</sup> See Mancur, above n 22.

In sum, the assumption that there exists a nexus between the development of market forms of economic life and the emergence of stable effective legal regimes holds true. Indeed, there is a striking similarity in the Weberian idea of the legal system providing a calculability and predictability of actors in the market and North's thesis that legal institutions provide a framework for states to provide credible commitments to market-enhancing property rights. In both instances, the legal system is seen as the handmaiden of the market. A subsidiary assumption in this respect is that law is about creating a set of bargaining chips or a set of entitlements and rights that enable transactions to be carried out between various market participants, all of which are predicated upon the existence of an independent and autonomous civil society, including the private sector.

The so-called new institutional economics shows however that institutions and the way they function are the result of a process of incremental change. Factors that promote change remain ineffective, because interest group behaviors, cultural preferences or simply historical accidents create sufficient inertia to prevent far reaching changes. The case at point is the East Asian cultures. The spectacular economic success of Hong Kong, Singapore, Taiwan, South Korea and China, has instead been based on a cultural emphasis on family relationships and business networks, as opposed to legal institutions. There is an emphasis upon collectivist values which puts business and social interests before those of the individual, and a reliance on informal networks of relationships to protect and promote business interests.<sup>464</sup>

In other words, institutional change tends to be path dependent. The concept of path dependency implies that even where more efficient alternatives are available, existing institutions prevail and continue to shape the process of socioeconomic change. For example, at least some people in the World Bank have started to recognize that there are different legitimate paths to growth. Some have started to rethink the paradigm where there are:

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<sup>464</sup> See Bahrin Kamarul and Roman Tomasic, 'The Rule of Law and Corporate Insolvency in Six Asian Legal Systems' in Kanishka Jayasurya (ed), *Law, Capitalism and Power in Asia: The rule of law and legal institutions* (1999) 154.

....explicit recognition of the failures of transplants and of top-down methods; rejection of a one-size-fits-all approach and stress on the need for context specific project development based on consultation of all "stakeholders"; awareness that legal reform requires a long time horizon and cannot be carried out quickly; recognition of the importance of the rule of law for poorer segments of the population; support for rule of law projects that deal with labor rights, women's rights, and environmental protection; and acceptance of the need to make access to justice an explicit dimension of judicial reform projects.<sup>465</sup>

## **B. *Institutional Divergence in Cambodia***

Governance plays an important role within the Cambodian context, and influences economic and social policies and their implementation. It is important to appreciate that Cambodia has only recently emerged from a civil war that destroyed much of the human and institutional infrastructure in the economy. Because of the extreme ideological positions taken by the Khmer Rouge regime, the devastation went far beyond the physical. Virtually all institutions were closed down and abandoned. All administrative networks - to the extent that they survived - were subjected to the dictates of the Khmer Rouge. Even more serious in their consequences were the persecution and killing of educated persons and the deliberate break-up of family units. Those who survived the Khmer Rouge years were - indeed many still are - traumatized by their experiences.<sup>466</sup>

Despite some major areas of strong convergence, the Cambodian experiences – policies and institutions – have shown that progress was shaped by its own unique cultural endowments –and geopolitical influence, thus implying that its path of catch-up differs from the West and advanced Asian countries. The legal divergence would suggest that laws and legal institutions in Cambodia vary not only in design, but also in function, as a result of different factors typically identified as culture, history, and tradition. The path-dependent effects of history are central to an understanding of the

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<sup>465</sup> See David M. Trubek, 'The "Rule of Law" in Development Assistance: Past, Present, and Future', above n 1, 92.

<sup>466</sup> See Bit, above n 414. See also Alex Raksin, 'Many Cambodian Refugees Still in Trauma', *Los Angeles Times*, 3 August 2005.



Cambodian economic development.<sup>467</sup> Its evolutionary process of legal and socioeconomic development was influenced in the last 2 centuries as the result of colonialism, and in recent history by genocide and foreign military occupation and influence. In contemporary history, the current shape and structure of the Cambodian legal system and its economic progress, or lack of it as the case may be, are largely the outcomes and by-products of historical distortions, the most extreme of which took place during and after the genocidal regime of Pol Pot. Moreover, the continuous divergence of institutions came as a result of the way Cambodia handles conflict resolutions and post-conflict governance.<sup>468</sup>

With almost an entire intellectual society and social infrastructure destroyed by three decades long of war and instability, the rebuilding of post conflict institutions became the most important element in Cambodia economic development equation. A variety of social institutions related to the operation of markets, administration, legislatures, political parties, nongovernmental organizations, the judiciary, the media and the community in general will need to be rebuilt, many from scratch.<sup>469</sup>

The Cambodian experiences have unfortunately not reflected positive institutional development. Cambodia began its journey toward liberal democracy in 1993, but has modestly consolidated the gains it has made. Democracy has neither deepened nor matured in the following first decade. The process of democratization then broke down when a violent incident/coup erupted in July 1997. Since the country experienced worrisome democratic erosion. Instead of engaging seriously in the process of institution building to help consolidate democracy, Cambodian leaders have become preoccupied or obsessed with personal and party power-consolidation, with the Cambodian People's Party (CPP) emerging as the country's most successful party in this regard. After that, political stability increased and two elections were subsequently held (in 1998 and 2003), but democracy gave way nonetheless to

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<sup>467</sup> North, above n 29, preface. In the preface of his book North has eloquently placed the path-dependent effects of history:

History matters. It matters not just because we can learn from the past, but because the present and the future are connected to the past by the continuity of a society's institutions. Today's and tomorrow's choices are shaped by the past. And the past can only be made intelligible as a story of institutional evolution.

<sup>468</sup> For a pessimistic readings of the current political scene see Hughes, *The Political Economy of Cambodia's Transition*, above n 99.

<sup>469</sup> See The Asia Foundation, *Democracy in Cambodia* (2003).

autocratic politics. Law is widely viewed from an instrumental view by the Cambodian ruling party, as desired, and to be manipulated, invoked, and utilized in the furtherance of their ends.<sup>470</sup>

To some extent, Cambodia never really had a democratic culture to begin with and as such political progress should be "measured" in the qualitative context of what is termed "democratic acculturation". One positive indicator in the early process of democratic acculturation is associated with the continuing effects of the constitution (largely drafted by UN advisers and adopted after the 1993 election), which was fairly liberal, although far from perfect by Western standards. A second positive indicator is that Cambodia continues to have a multi-party electoral system and has thus far held national elections on a regular basis. A third positive indicator might be seen in the fact that political parties seem more readily to accept election outcomes.<sup>471</sup>

Going along the line of new institutional economics, the Cambodian experiences explains why the country could not catch up fast enough with other resurgent Asian economies despite massive development assistance and a strong external trade performance. Its inability to effect the required institutional changes to improve the functioning of formal institutions is the key to explaining three problems identified as constraining Cambodia's economic performance and efforts to address poverty - deteriorating competitiveness because of uncertainty in the business environment; lack of growth in the agricultural sector; and constraints in government capacity.<sup>472</sup> Arguably, these constraints have emerged from the ways in which conflict resolution has been handled by various political factions within the Government. Their focus on boosting their respective status and power through strengthening their power base in

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<sup>470</sup> For a critical analysis of an instrumental view of law, see specially, Brian Z. Tamanaha, *Law as a Means to an End: Threat to the Rule of Law* (2006).

<sup>471</sup> See Sorpong Peou, 'The UN's modest impact on Cambodia's democracy', above n 39, 264. See also Sorpong Peou, *Intervention and Change in Cambodia: towards democracy?*, above n 52.

<sup>472</sup> For a thorough appreciation of the capacity of the government see the following documents: Cambodian Development Research Institute (CDRI), *Draft Policy on Capacity Development in the Cambodian Civil Service: Key Concepts, Terms and Principle* (2007); Council for Administrative Reform, *Capacity Building Practices of Cambodia's External Partners: A Framework for Capacity Development: Mandating Effectiveness and Value for Money* (2004); Council for the Development of Cambodia, *Capacity Building Practices of Cambodia's Development Partners: A Discussion Paper* (2004).

the military and the civil service, has militated against the enactment of credible governance reforms.<sup>473</sup>

State institutions, such as the legislature, the judiciary, the military, and the security apparatus remain subservient to their interests and to those of the ruling elites. The CPP has been successful in consolidating its power at the expense of a weak democracy. The legislature, for instance, is far from becoming politically effective particularly when members of parliament (MPs) can be stripped of their parliamentary immunity. The controversial new law scrapping lawmakers' right to speak freely in parliament has sparked concerns that Cambodia has taken a step backward from democracy. The US Embassy called the passage of the law an "historic event" that has emasculated the National Assembly. US Ambassador Joseph Mussomeli said in an e-mailed statement that '[h]istorically there have been isolated instances of individuals being castrated, but this may be the first instance of collective self-castration'.<sup>474</sup>

A new Law on the Status of National Assembly Members, which CPP and Funcinpec parliamentarians voted in favor of opens the way for lawmakers to be charged with criminal offenses without their parliamentary immunity first being removed. It states that lawmakers cannot use their immunity to abuse an individual's dignity, public order, social customs or national security. Lawmakers can also be arrested immediately if they commit a "serious crime," which the law does not attempt to define.

In term of their oversight power explicitly provided for under the Constitution, the legislature barely exercised it. Articles 96, 97 and 98 of the Constitution provide that the National Assembly is required to set aside one weekly hearing whereby the responsible minister will be required to appear to defend his/her policies and acts. A monitoring done by the Center for Social Development (CSD) shows that out of 56 days sitting, the Parliament spent only two days (or 4%) questioning ministers.<sup>475</sup> The

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<sup>473</sup> Hughes, above n 468.

<sup>474</sup> See Yun Samean and Erik Wasson, 'US Envoy: Speech Law an Act of 'Self-Castration'', *The Cambodia Daily* (Phnom Penh) 1 September 2006; see also 'Civil society condemns Parliament's motion to strip immunity from opposition leader Sam Rainsy', *Development Weekly* (Phnom Penh) 7 – 13 February 2005.

<sup>475</sup> See CSD, *Report on the Process of the National Assembly Sessions : 1st, 2nd and 3rd Sessions*,

MPs from the ruling parties usually protect and support requirements of the Executive. Most debates on proposed legislations focus on the terms in which the law is written and on procedure, rather than on its substance. The process of law adoption was debated and adopted in a hasty manner. Some MPs do not express opinions and simply raise their hands to give support. During the third mandate Ordinary Sessions of the National Assembly (first, second and third sessions) only 35% of MPs express their opinions in each session.<sup>476</sup>

Even the Constitutional Council, which has the responsibility for protecting and interpreting the Constitution, has shown, in two landmark decisions, a marked reluctance to challenge government legislation on the grounds that it violates human rights guarantees. In December 2004, the Constitutional Council upheld the constitutionality of the 1991 Law on Demonstrations, despite a widespread view that the law violated the constitutionally guaranteed right to peaceful assembly. In November 2006, the Council upheld a Law on the Status of National Assembly Members, rejecting an application from a group of opposition members that it violated the constitutional guarantees of parliamentary immunity provisions and the right to freedom of expression.<sup>477</sup>

Rules can be easily twisted and broken. In report after report, no concrete evidence is given to show any genuine progress in the area of judicial, military, and police institutional reforms. These institutions are either too powerless (the judiciary) or too powerful (the military and police) to serve the interest of democracy. They either serve their own interests (evident in their rampant corruption) or the interest of the CPP and pro-CPP interest groups. Economic benefits have become highly concentrated in several hands that either hesitate to challenge political elites or actively support them. After more than a decade of economic reconstruction, Cambodia remains relatively one of the Asia's poorest nations and its public institutions are seen as highly inefficient and corrupt. Ear argues that:

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*and the First Extra-Ordinary Session, 3rd Mandate, 15 December 2003-15 December 2005 Parliamentary Watch Project (2005) 4.*

<sup>476</sup> Ibid.

<sup>477</sup> See Human Rights Council, *Implementation of General Assembly Resolution 60/251 of 15 March 2006*, above n 432.

.... save for political stability, aid has not had a positive impact on governance in Cambodia. The failure on control of corruption shows how hard it is for donors to be tough on a country with extreme poverty. On the basis of what has been accomplished to date, however, aid seems unlikely to be able to deliver large improvements in governance and in many ways may even contribute to its further deterioration.<sup>478</sup>

Cambodia is placed by Transparency International on its Corruption Perception Index at 139th out of 159 countries.<sup>479</sup> Worse, the World Economic Forum's *Global Competitiveness Report* (2005-2006) ranked Cambodia's public institutions 114th among 117 countries or as the third most corrupt among 117 countries.<sup>480</sup>

## II. THE ROLE OF THE MILITARY IN THE CAMBODIAN POST CONFLICT GOVERNANCE

One key for understanding Cambodia's current institutional predicament lies in its recent history. The implementation of the Paris Peace Agreements by the United Nations Transitional Authority in Cambodia (UNTAC) fell short of what was intended, particularly with regard to ending the civil war. Akashi defended the limited success of the UNTAC operations in these terms:

....It was beyond the mandate of UNTAC to put a stop to bitter political bickerings, nor was it within its reach to lift Cambodia from its endemic poverty or serious urban-rural disparity in a year and a half. The State of Cambodia also had to struggle with remnants of the Khmer Rouge, even though its strength was fatally weakened by its boycott of the democratic process.<sup>481</sup>

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<sup>478</sup> See Sophal Ear, 'The Political Economy of Aid and Governance in Cambodia' (2007) 15 *Asian Journal of Political Science* 68 – 96.

<sup>479</sup> Transparency International (TI) determines Cambodia's level of corruption is "a chronic disease". Cambodia received 2.3 out of 10 points on a global rating, and 4.28 out of 10 points on a regional scale for corruption. TI regards a country scoring below three points as plagued by chronic corruption. In the 24-nation Asia Pacific region, Cambodia is ranked 19th, along with Papua New Guinea. Indonesia, Pakistan, Myanmar and Bangladesh follow. Cambodia falls behind Thailand, Laos, China, Sri Lanka, Mongolia, Nepal and the Philippines. <[http://www.transparency.org/policy\\_research/surveys\\_indices/cpi/2006](http://www.transparency.org/policy_research/surveys_indices/cpi/2006)> at 30 June 2008. See also World Bank governance indicators at <<http://info.worldbank.org/governance/wgi2007/home.htm>> at 30 June 2008.

<sup>480</sup> <<http://www.weforum.org/en/initiatives/gcp/Global%20Competitiveness%20Report/index.htm>> at 30 June 2008

<sup>481</sup> See Akashi, above n 52.

The involvement of the United Nations in Cambodia in the early 1990s was aimed at restoring normalcy to a country that had endured civil war for more than 20 years as well as the genocidal regime, at repatriating and resettling refugees, at disarming the warring parties, and at putting in place a representative government. There was an assumption that, if these goals were achieved, Cambodia would be able to develop and lift its people out of the fear and poverty in which most had lived for decades.

The one goal that was not achieved was the disarmament of all the warring parties. The Khmer Rouge refused to disarm and pulled out of the entire peace process. The UN organized elections, produced a multi-party National Assembly and a government, but did not significantly alter the pre-UNTAC power structure: i.e. notwithstanding the majority obtained by the *Front uni national pour un Cambodge indépendant, neutre, pacifique, et coopératif* (FUNCINPEC),<sup>482</sup> the CPP remained effectively the dominant power retaining control of most elements of the armed forces and the civil service.

Thus, the end of the war has not been associated with a demilitarization of society. Militarization continued throughout the 1990s along with its numerical and political influence. The threat perceptions of politicians required to share power in the aftermath of civil war have prompted political strategies in which the support of various sections of the military loom large as resources of power. Concern to retain or attract the support of military generals has constituted the single most important driving factor of Cambodian politics outside of electoral politics, since 1994.<sup>483</sup> This has produced a military that devours international aid and dominates important sectors of the economy particularly the natural resources sector or transportation routes. In the logging industry, for example, there have been reports of the military awarding concessions illegally; hiring out personnel to guard both legal and illegal concessions; demanding and receiving bribes in exchange for permitting the transportation or smuggling of logs; and intimidating non-governmental or governmental actors who

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<sup>482</sup> Funcinpec is an abbreviation for the French title *Front uni national pour un Cambodge indépendant, neutre, pacifique, et coopératif*, or “National United Front for an Independent, Neutral, Peaceful, and Cooperative Cambodia”.

<sup>483</sup> A survey showed that 24 per cent of the population base their voting decision primarily on concerns to keep the peace, indicating that not merely politicians but also voters seek to propitiate the military to prevent a return to warfare. The Asia Foundation, *Democracy in Cambodia*, above n 469, 6.

attempt to interfere with this trade.<sup>484</sup> The military have performed a similar function with respect to fishing lots and land concessions.<sup>485</sup> With their firm control on many of the most profitable natural resource industries in the country, and acting as a welfare machine for thousands of soldiers, the military wields economic and electoral power, beyond its capacity for violence.

Because support of the military remains critical to civilian politics, leaders were reluctant to rationalise the military for fear it would alienate generals who, since 1989 at least, have developed extensive business interests based upon control of lucrative resources.<sup>486</sup> Worse, the Government has continually ploughed resources into the military. Defence expenditures reached 50 per cent of the government's total budget in the mid-1990s, and regularly ate into allocations for basic services such as education and health. Total government expenditure on education, health, rural development and agriculture only exceeded expenditure on defence and security for the first time in 2002, four years after the war ended, despite dire needs in the service sectors, and the identification of rural development, as early as 1995, as "the Royal Government's ultimate objective".

The implications of militarization on Cambodia's economic development, particularly in rural areas, were clear. The Government has continually de-prioritised pro-poor policy in favour of policies that preserve the power of vested interests. Services such as health and education have been de-prioritised in government spending, in favour of diversion of resources to the military. The privatization of land and natural resources has occurred violently, with a lack of transparency, and with little attempt to ensure accessibility to legal process by the poor and illiterate. In terms of governance, it prevents the emergence of rational plans for the use of resources and entails the continued weakness of regulatory institutions of government. With regard to the business environment, it imposes costs for legal operators who are forced to pay

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<sup>484</sup> For an exhaustive account of the systematic stripping of Cambodia's natural assets by a small elite of politicians, and businessmen working with the army, see Global Witness *Cambodia's Family Trees* (2007). <[http://www.globalwitness.org/media\\_library\\_detail.php/546/en/cambodias\\_family\\_trees](http://www.globalwitness.org/media_library_detail.php/546/en/cambodias_family_trees)> at 30 June 2008.

<sup>485</sup> Joint Donor Statement on Natural Resources Management, Land and Agriculture at the 8<sup>th</sup> Consultative Group Meeting, Phnom Penh, 2-3 March 2006.

<sup>486</sup> NGOs slam Battambang court for dropping charges against armed forces in fatal land conflict in Poipet. *Development Weekly* (Phnom Penh) 22 – 28 August 2005.

bribes and it creates a climate of insecurity and illegality which discourages reputable investors from investing.<sup>487</sup>

### III. THE ROLE OF THE CIVILIAN STATE APPARATUS IN THE CAMBODIAN POST-CONFLICT GOVERNANCE

Similar dynamics are evident in the civilian state apparatus and many aspects of the economy are shaped by this legacy. The current structure of the government incorporates an expanded civil service to include members from all sides of the political divisions in the decision-making process of the country, as part of the 'peace dividend'. Despite the claim that the benefits of political and social stability far outweigh any negative implications of such a structure, this has contributed to institutional flaws which often render policy outcomes ineffective. Numerically, the civil service is bloated, as contending parties resist the downsizing of their own supporters. In terms of efficiency, it functions extremely poorly, primarily because the level of remuneration is insufficient to support an individual or family.<sup>488</sup> In part because salaries are low, many civil servants appeared to be exploiting opportunities to seek rents, which further complicated the business environment. Many civil servants remain on the payroll only to benefit from "insider status" and connections, but have stopped "going to work" in order to pursue secondary occupations in the private sector. Others depend upon the abuse of their position for rent-seeking to generate income. This has not merely reduced the efficiency of the civil service, but has actually transformed civil servants into obstacles to economic activity, to be assuaged with a flow of gifts and bribes. Wealthy cliques and networks of corruption have emerged within the bureaucracy - a development which furthers the potential for political factionalism within the civil service as state officials look to political leaders to protect their various scams and abuses.

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<sup>487</sup> For more on the role of the military in the Cambodian post conflict governance, see Hughes, above n 468.

<sup>488</sup> Cambodia's ratio of the average civil service wage to per capita GDP is one of the lowest in the region. With the exception of a very limited number of high level staff (approximately 700 out of nearly 168,000 in 2003), most civil servants earn very little, in either absolute or relative terms. See World Bank and Asian Development Bank, *Cambodia: Enhancing Service delivery through Improved Resource Allocation and Institutional Reform, Integrated Fiduciary Assessment and Public Expenditure Review* (Undated).



That the government has actively supported this mode of development is evident from a number of policy failures in the 1990s. For example, the notorious article 51 of the Law on the Statutes of Civil Service produced in line with the requirements of the 1993 Constitution effectively institutionalized impunity for corrupt or abusive actions on the part of state and military officials, by determining that courts wishing to try such officials must gain the permission of the accused's superior before issuing a summons or making an arrest. Although subsequently repealed in 1998, this article reflected an apparent intention in the 1990s to strengthen the executive at the expense of other arms of government.

Equally, attempts to professionalise the civil service or the judiciary by, for example, raising salaries and reducing the need for bribe-taking, have been continually avoided. Donor-led rationalisation plans have been accepted in principle but resisted in practice, as have plans for legal and judicial reform that could transform the courts from corrupt and inaccessible tools of the government into a meaningful arena for review. Meanwhile, the number of explicitly political posts and sinecures in the government and state have mushroomed, both through the award of hundreds of paid positions of "prime ministerial advisor," the creation of an appointed Senate in 1998, and the expansion of the number of cabinet posts in 2004. In February 2006, the Prime Minister criticized the practice of buying and selling public service positions and announced that the practice of political appointments to civil service positions will no longer be accepted. Development partners though recognizing that these practices are deeply embedded and will be difficult to root out congratulate the Government for identifying these difficult problems. They hope that shining a light on these practices can pave the way for more merit-based approaches.

Lack of professionalism in the civil service, emerging from this situation, has implications for the government's performance in macro-economic policy. On the one hand the Government has been praised for the "tight budgetary discipline" that has underwritten a stable exchange rate and low inflation throughout the past decade. However, such budgetary discipline is possible because of the non-functioning of the civil service and military as arms of the state, and the transformation of them into

networks of entrepreneurial interest instead. The loyalty of state and military functionaries is attracted through the provisions of goods that do not appear in the national budget, reducing pressure to raise salaries. Budgetary discipline in a climate of severe dearth also shows the disempowerment of the service ministries - indeed, the lack of any constituencies within the state or society capable of demanding resources from the government. The result is poor health and education services and the continued levying of informal fees on patients and parents. This has far-reaching effects on human development and on the rural economy - the single most common cause of landlessness is the sale of land to pay the high costs of accessing healthcare.

At the same time, other elements of macro-economic policy - notably, the attempt to increase revenue flows - have enjoyed only limited success. Despite the existence of a comprehensive budget legal framework, the multiplicity of controls and the centralized nature of the expenditure management system, weak financial management practices, and a weak organizational culture of compliance with the law, ethical and professional standards, still undermine transparency and accountability, posing serious fiduciary risks. The Government revenue shortfalls while resulting from the interplay of these factors, is further compounded by the lack of ownership, frail political will and corruption. Schemes to release revenue through regulated exploitation of forest resources were instituted in the mid-1990s, but have been dogged by the tendency to illegality and corruption. The tax revenue mobilization was seriously undermined by delays in the implementation and enforcement of measures owing mostly to political pressures, and a serious erosion of the tax base due to ad-hoc extensions of tax and customs exemptions and holidays.

Efforts to promote tighter customs regimes and tax collection have enjoyed very limited success as large sums are lost to smuggling, bribes and other illegal practices. Further losses are experienced once revenues enter the state financial system. Estimated annual diversions from government coffers range between \$300 and \$500 million.<sup>489</sup> Despite pressure from donors, government revenue only managed an increase of 1.7 per cent of GDP between 1999 and 2004, rising from 10.2 percent to

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<sup>489</sup> A report prepared by Casals & Associates for the US Agency for International Development estimates that the Cambodian government loses between USD 300 million and USD 500 million in revenues per year due to low and high level corruption. See 'US report highlights prevalence of rampant corruption' *Development Weekly* (Phnom Penh) 8 – 14 November 2004.

11.9 percent. The non-tax revenue collections were adversely affected by the lack of transparency, control and accountability of government contracts for the provision of services, and the income foregone from the forestry sector owing to a lack of an effective forestry management system and substantial illegal logging.

#### IV. THE EFFECTS OF MILITARIZATION AND THE DEARTH OF INSTITUTIONS ON CAMBODIA'S ECONOMIC DEVELOPMENT

Cambodia's current institutional legacy was certainly altered by the successive political, economic and social upheavals throughout the last half of the 20th century. Military conflicts and political strife isolated Cambodia from global trends that have profoundly reshaped some of its neighbors, and then UNTAC and subsequent events thrust the country abruptly into the modern world. Following the Paris Accord, Cambodia's former Communist leaders embraced a hybrid system of predatory market economics and authoritarian control. This system, with its resultant impunity, along with widespread poverty and a dearth of institutions, has given rise to an all-encompassing corruption environment. Bribery or the '*relational capital*' has become 'an institutional alternative' to developed formal legal and bureaucratic structures. Bribery/cronyism and the rule of law have existed in a complementary rather than in an antagonistic relationship. Cambodia now, on the surface at least for the few in power, blatantly displays some of the most negative aspects of modernism and capitalism: exploitation *sauvage* of state resources and the masses, materialism, greed, egoism, and brutal competitiveness.<sup>490</sup>

A notable case of greed is the scandal on the UN World Food Programme. Kazmin describes:

For years, the United Nations World Food Programme has provided impoverished Cambodian farmers with oil, fish, salt and rice in exchange for their work building local roads, irrigation

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<sup>490</sup> Corruption in Cambodia is a major public concern as demonstrated in various public opinion surveys conducted by the Centre for Social Development and the World Bank respectively in 1998 and 2000. See, eg, World Bank, *Cambodia Governance and Corruption Diagnosis: Evidence from Citizen, enterprise, and Public Official Surveys*, above n 136; Calavan, Michael, Sergio Briquets and Jerald O'Brien, *Cambodian Corruption Assessment*, above n 452; Leila Webster and Don Boring, above n 411. The MPDF study highlights the high cost of bribery in Cambodia. Based on data provided by several hundred manufacturers operating in Cambodia, the so-called bribe tax is roughly 5 percent of total sales in the manufacturing sector. Indeed, operators report that corruption is not only the most important deterrent to investment, but that it has also increased in recent years.

ponds and canals. But this massive food-for-work programme was effectively suspended, after a truck loaded with rice for the needy unexpectedly went astray. The subsequent UN probe revealed that the \$72m charitable programme — designed to help nearly 1 million people a year for three years — was riddled with fraud. From January 2003 until the late February freeze, around 44 per cent of the food sent out was stolen, or "diverted", by government officials, who inflated aid recipient lists with fake names and lied about work projects that were never undertaken. The willingness of officials to steal food brazenly from the poorest, most vulnerable citizens illustrates a deep-rooted culture of graft that threatens to choke Cambodia's economic progress. Rarely has a humble shipment of rice caused such an upset.<sup>491</sup>

Allegations of corruption are widespread where grand corruption involving illegal grants of logging concessions coexists with the nearly universal practice of small facilitation payments to speed or simply secure service delivery. "Survival" corruption is a way of life for the poor, and a succession of medium and large-scale corrupt acts are the ticket to wealth for the politically powerful. Corruption is structured more or less as a pyramid; with petty exactions meeting the survival needs of policemen, teachers and health workers, but also shared with officials higher in the system. Police and other officials demand small bribes in numerous guises. Students across the public school system pay unofficial daily fees to supplement salaries of teachers and administrators, and perhaps fill the pockets of high-level education ministry officials. The same is true in public health, where access to services is often contingent on supplemental payments to doctors, nurses or other health care personnel.<sup>492</sup> Other forms of diversion include significant-in-the-aggregate exactions, such as ministry employees who collect per diem for official travel, but then must pay a portion back to their supervisors. Patronage and mutual obligations are the center of an all-embracing system. Appointment to public office hinges on political connections or payment of surprisingly large sums, and these payments are recouped through a widely accepted "right" to collect bribes.

<sup>491</sup> See Amy Kazmin, 'Graft culture that threatens Cambodia's economy', *Financial Times* 9 September 2004; 'Government to repay full amount lost in World Food Programme', *Development Weekly* (Phnom Penh) 4 – 10 October 2004.

<sup>492</sup> According to a survey, the average Cambodian household spends 1.4 percent of its yearly expenditure on bribes in urban areas, with well-off families paying the most. This figure does not indicate the poor are charged fewer informal fees, but have much less access to services. See Center for Social Development (CSD), *Report on Corruption Perception Barometer: Voice of the People* (2005).

## 1. *Corrupt practices*

Since the 90s, the prerogative of those in power to control economic activities is seldom challenged. As in other ex-socialist states, political and economic "reforms" of the early transition phase gave way to a wholesale process of state capture. One manifestation was spontaneous privatizations, as the dominant political class assumed de facto control of much of the country's patrimony.<sup>493</sup> Resources under state control, ostensibly managed on behalf of citizens, are routinely appropriated by leaders. Through shady and non-transparent deals, state-owned enterprises were taken over by politicians or their cronies who awarded themselves concessions in forestry and agriculture land, rubber plantations, and other economic monopolies.<sup>494</sup> Prime state land is given to crony companies, sometimes with no payment at all. Housing vacated by Vietnamese administrators in 1989 was promptly appropriated by the ruling party leaders. It is estimated that between 20-30 percent of the country's land, the main source of wealth, has passed into the hands of less than one percent of the population.<sup>495</sup>

Decollectivisation of agriculture and privatisation of previously collectively farmed and held land almost invariably results in land grabbing by the local power elite or the army.<sup>496</sup> The ongoing land grabbing problem carried out by powerful people has not been resolved yet. Land disputes remain a hot issue, involving many families and rich or powerful people in conflicts over possession rights. In the wake of decollectivisation in 1989 and, in particular since the 1993 elections when contesting political parties made promises concerning land redistribution, the number of land disputes has risen dramatically and has in many areas become a serious problem. These disputes are typically between families over possession of a house or a farming

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<sup>493</sup> See Gottesman, above n 50, 318-320.

<sup>494</sup> The November 2004 report by the Special Representative of the Secretary-General for human rights in Cambodia highlights the negative impact of present land concession policies and practices on rural livelihoods and human rights. See Cambodia Office of the High Commissioner for Human Rights (OHCHR), *Land Concessions for Economic purposes in Cambodia: A Human Rights Perspective*, above n 413; OHCHR, *Economic Land Concessions in Cambodia: A Human Rights Perspective*, above n 413.

<sup>495</sup> Global Witness, above n 484. See also Calavan, Michael, Sergio Briquets and Jerald O'Brien, *Cambodian Corruption Assessment*, above n 452.

<sup>496</sup> Viviane Frings, 'Cambodia After Decollectivization: 1989-1992' (1994) *Journal of Contemporary Asia* 24.1: 49-66.

plot, claims for recovery by dispossessed pre-1975 land owners, and illegal sales and forceful appropriation of land. Many land disputes have occurred during the period 1989 to 2001, in which at least one of the parties are powerful or rich. In most of the cases, one party is powerful, having documents to prove their case, and the other party is a group of poor families that do not have documents even though they are occupants. Such activities would allow powerful parties to use the titles to grab farmers' land through the court system.<sup>497</sup> Inadequate cadastral capacity and long delays in the issuing of land titles aggravate the problem. Land problems have been caused by the destruction of land title records and a combination of many factors including: (i) inadequate land law; (ii) a general situation of weak governance in provinces; (iii) wholesale privatization common property forests and wetlands; (iv) weak capacity of land titling and administration; (v) distress sale of land often related to defaulting on loans; and (vi) lack of a legal framework to cover the management and use of state land and real estate.<sup>498</sup> Even though the 2001 Land Law prohibits land encroachment in general, fertile land with agricultural potential and which is accessible for cultivation belongs to powerful people.

Large-scale logging is also occurring under the guise of land concessions and plantations situated on forestland. Plantation developments have frequently targeted the most valuable forest areas rather than non-forest areas or scrub lands that would be more appropriate for conversion to agriculture. Having accepted a logging ban to placate international critics, the Government has shifted from forestry concessions to agricultural concessions, enabling foreign firms to proceed with clear cutting "to establish plantations." With the timber concession system in suspension, these conversion projects are being used as an alternative means of accessing the resource. Almost all have been awarded in secret; large-scale economic land concessions are also being illegally established in Cambodia's national protected areas, threatening forest ecosystems, watershed and biodiversity values as well as contradicting the Cambodian government's commitments to national and international conservation efforts.

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<sup>497</sup> See, eg, Greve, above n 219; Sik Boreak, 'Land Ownership, Sales and Concentration in Cambodia' (Working Paper No. 16, CDRI, September 2000); See also UNDP, *Land and Human Development in Cambodia* (2007).

<sup>498</sup> Ibid.

While Cambodia's forest resource base is estimated to cover over half of Cambodia's land area, much of it has been significantly degraded over the last ten to fifteen years. According to FAO report, Cambodia's virgin forest has undergone some of the worst destruction in the world during the past five years. The forest coverage of 13.2 million hectares (73 percent of the country) in 1969 was reduced to 10.6 million hectares (58 percent) in 1997. The most intensive deforestation appears to have occurred in the last few years (1993-97). In this period, another 700,000 hectares were deforested, accelerating the annual rate to over 180,000 hectares. If this rate is maintained, the rest of the 10 million hectares of forest area will be totally depleted in less than 60 years. It is estimated that of the total land deforested in the past five years, 345,000 hectares were relegated to shrub lands, and a similar amount converted to agriculture.<sup>499</sup>

Substantial areas were allocated as timber concessions, other areas were logged by non-concessionaires. Increasingly, forest cover is being lost permanently as it is clear cut for large-scale plantation developments controlled by a few wealthy businessmen. The majority of the illegal logging activities are organised by members of the military and the police, in conjunction with commercial timber traders, and with the backing of high-ranking officials and the political elite.<sup>500</sup> If all the slated economic concessions on forestland proceed, conversion will accelerate, a few families and companies will become the de facto owners of the bulk of Cambodia's converted forestland, and inequality in the distribution of income will worsen. Agricultural landlessness has increased by 20 percent in 2002, 25 percent have land less than 0.5 hectares in size, and 45 percent are landless or near landless. 10 percent own 40 percent of the land in Cambodia.<sup>501</sup>

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<sup>499</sup> See 'FAO: Illegal logging and rapid development destroy large swaths of Cambodian virgin forest', *Development Weekly* (Phnom Penh) 28 November - 4 December 2005.

<sup>500</sup> The Ministry of Environment filed a new complaint against Rattanakiri Provincial Governor Kham Khoeun and Provincial Police Chief Yoeung Baloung over illegal logging last year in Virachey National Park. See 'Environment Ministry files new complaint against Rattanakiri governor over illegal logging offenses', *Development Weekly* (Phnom Penh) 28 November - 4 December 2005.

<sup>501</sup> See Kim Sedara, Chan Sophal and Sarthi Acharya, 'Land, Rural Livelihoods and Food Security in Cambodia: A Perspective from Field Reconnaissance' (Working Paper 24, Cambodia Development Resource Institute (CDRI), 2002).

## 2. *Corrupt Institutions*

Existence of vertical relationships between economic actors and the state took the form of large-scale corruption requiring broad and diverse institutional support. The Government has developed a full array of outside institutions - captive firms, controlled media, party-affiliated NGOs and unions as well as the police, military, ministries, judiciary and parliament to support a corrupt system. There is a hierarchy of ministries from the viewpoint of corruption opportunities. The Ministry of National Assembly-Senate Relations and Inspection revealed in its first inspection report since its creation six years ago, widespread graft has cost the national treasury nearly US\$30 million. The ministry has received 53 complaints since it was established in 1999. The institution should produce an inspections report each year, but has written just one due to a lack of resources.<sup>502</sup> Finance, which signs off on transfer of funds to other ministries, and controls customs and the tax office,<sup>503</sup> and Agriculture, which controls forest and agricultural concessions, are at the top of the list. The World Bank revealed that it has uncovered fraud and other illegal issues in four major projects it funds in Cambodia. In its findings the World Bank cites fraud, rigged bids, collusion and other illegal maneuvers to siphon money from multi-million dollar projects funded by the organization. Commerce follows with the sale of garment quotas. Health and Education are presumably mid-level, with modest opportunities to manipulate construction contracts and procurements of medications and textbooks.<sup>504</sup> Education also controls a number of examinations, and thus is in a position to sell positive results.<sup>505</sup> In the Judiciary - including the courts, prosecutors, police investigators, and the private bar - corruption interferes with all aspects of the judicial system, from the criminal investigation by the police to the rulings of the highest

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<sup>502</sup> See 'Inspection Ministry reports \$30 million loss in corruption', *Development Weekly* (Phnom Penh) 23– 29 May 2005.

<sup>503</sup> See 'Fraud and corruption revealed in multi-million dollar World Bank development projects' *Development Weekly* (Phnom Penh) 26 September – 2 October 2005.

<sup>504</sup> 'Alleged corruption blights rural project', *Development Weekly* (Phnom Penh) 10 – 16 December 2007.

<sup>505</sup> See, eg, 'The president of the Cambodian Independent Teachers' Association denounces high cost of corruption in Cambodian schools', *Development Weekly* (Phnom Penh) 23 – 29 October 2006; 'The National University of Management lecturers strikes over nepotism and corruption', *Development Weekly* (Phnom Penh) 12 - 18 June 2006.



courts.<sup>506</sup> Within these corrupt institutions individuals build ruthlessly their power through complex networks for corruption and amass enormous personal wealth. The notoriously more lucrative possibilities for payments of rents in the courts and the civil service more generally continue to attract young law graduates to government rather than into private practice.

### 3. *Lack of progress in the fight against corruption*

Political leaders seem well aware of a basic principle of corrupt governance: Inefficient, opaque procedures create confusion and impatience, and encourage firms and individuals to pay ‘facilitation money’ and bribes. Thus a businessman noted that procedural mistakes are common in various departments like the Customs, Tax, and the Export Licensing departments, creating clear invitations to bribe. Despite the enactment of the Law on the Environment in 2001 requiring environmental and social impact studies before forest and agricultural concessions are approved, "inefficiency" in the Ministry of Agriculture has essentially waived this requirement. Low ranking court personnel profit from over-complex and cumbersome administrative procedures. Inefficiency also helps to limit information resources, maintain Government control and justify shoddy administrative procedures.

Weak governance and the failure to control corruption and enforce the rule of law underscore the country's limited institutional capacity, the lack of trust among the elite and strong resistance to reforms from powerful vested interests. No one with the patronage of the state is punished, whether for massive pillaging or petty theft. In fact, those most at risk are individuals and organizations that dare to resist corruption. Most Cambodians regard resistance as a futile act.<sup>507</sup> Evidence gathered in 2004 by NGOs and others suggests that almost all serious forest crimes are committed with the knowledge or active participation of members of the armed forces, the forest

<sup>506</sup> The Ministry of Interior has called on the Ministry of Justice to review 274 court case from 2003 and 2004 in which the accused persons were acquitted and released. See ‘Ministry of Interior demands scrutiny of Justice Ministry’s activities’, *Development Weekly* (Phnom Penh) 4 – 10 October 2004.

<sup>507</sup> In a Survey of Cambodian Public Opinion done by the IRI during the period 20 December 2006 – 20 January 2007 face-to-face interviews were conducted in all 24 provinces. When asked as to what issue most affects people’s daily life only 4% of the respondents felt that corruption does. See International Republican Institute (IRI), *Survey of Cambodian Public Opinion*, above n 452.

administration, the police and other senior officials.<sup>508</sup> Despite this overwhelming evidence, those provisions of the forestry law relating to crimes committed by officials have not once been implemented since the law came into effect in 2002.

Moreover, the provisions of the 1992 UNTAC law apply to acts of corruption. Crimes related to corrupt practices are covered by provisions on Embezzlement by Public Officials (Article 37), Corruption (Article 38) and Bribery (Article 58). Other provisions on perjury, forgery, receiving and concealing stolen goods, breach of trust are also relevant. Very few court cases appear to have been filed against anyone directly on charges of corruption under Article 38. The problem lies not with the existing provisions, but the failure to take action. The land law continues to be poorly administered and enforced, and registration was often defective. Property rights were strengthened for the general population but had limited or no effect on the executive's ability to grab land, including land belonging to ethnic minority groups. On 9 August 2005 ethnic minority groups from across Cambodia joined a seminar in the capital where they voiced concerns over seizure of their land, offenses against their culture and lack of infrastructure.<sup>509</sup> While the existing criminal laws allow for prosecution for corruption, very few cases have been brought to court, and only a few government officials has been charged for corruption. Prime Minister Hun Sen reaffirmed his commitment to combat corruption, suggesting the government should encourage the public and media to investigate graft.<sup>510</sup> In a grand show of his new commitment to anti-corruption, Prime Minister Hun Sen unexpectedly announced the dismissal of the national tax chief to a packed audience attending a conference on good governance.<sup>511</sup>

Although the international community is well aware of the situation, it has thus far failed to persuade the Government to take effective action against corruption.<sup>512</sup> The

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<sup>508</sup> Global Witness, above n 484.

<sup>509</sup> See 'Ethnic minorities voice concerns over land grabbing, disregard by government', *Development Weekly* (Phnom Penh) 15 – 21 August 2005.

<sup>510</sup> See 'Prime Minister reaffirms commitment to curb corruption'. *Development Weekly* (Phnom Penh) 22 – 28 August 2005.

<sup>511</sup> See 'Hun Sen fires tax chief in first battle against corruption' *Development Weekly* (Phnom Penh) 20 – 26 December 2004; 'Former Funcinpec Kampot governor accused of corruption', *Development Weekly* (Phnom Penh) 24 – 30 July 2006.

<sup>512</sup> See, eg, 'EU report criticize public institutions, but stresses need for further aid', *Development Weekly*, (Phnom Penh), 17 – 23 July 2006, 1.

Cambodian authorities have long acknowledged governance problems as a cross-cutting issue, but little has been done so far to address them.<sup>513</sup> When donors persist in pressing for reform, the government simply stalls. Donors voiced increasing frustration at the Cambodian government's continued failure to pass an anti-corruption law or act on land grabbing and other related issues at a tense meeting in the capital.<sup>514</sup> The reasons for donors' comparative mildness in demanding reforms are varied. The early priority was to pacify the country and reconstruct dilapidated infrastructure. Through most of the 1990s, maintaining political stability and reasonable economic growth seemed a substantial achievement in light of the horrors of the Khmer Rouge years and the two decades of civil war that followed. Geopolitics and regional strategic interests also played a role, allowing the ruling elite to divert international donors.<sup>515</sup> Like most recipient governments, the Government prefers to deal with donors one at a time, or in isolated sectoral working groups. In an apparent effort to convince donors that activity is more important than commitment, the Government has participated in preparing innumerable plans and has established numerous councils. The plans reflect state-of-the-art thinking in the international donor community, and are rich in rhetoric on such themes as good governance, transparency, accountability and participation. The latest National Strategic Development Plan (2006- 2010) is a good example. It is the master development plan for the country, and all bilateral and multilateral assistance is expected to be aligned and harmonized with its priorities and principles. While it commits the Government to key principles such as participation, non-discrimination and accountability, it does not include concrete measures to translate these principles into practice.<sup>516</sup> There is also a multitude of reform councils, among others, an Anti-Corruption Council, a Council for Judicial and Legal Reform, a Council on Social Development, a Council on Land Reform, etc.

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<sup>513</sup> Hun Sen, 'The Prime Minister acknowledged graft as one of Cambodia's biggest flaws, and said there was no easy fix' (Keynote speech at the 8<sup>th</sup> Consultative Group Meeting, Phnom Penh, 2-3 March 2006); 'PM launches war on corruption just in time for donors meeting', *Development Weekly* (Phnom Penh) 20– 26 September 2004. The PM said, not for the first time, that he will remove all corrupt officials from their positions and punish them before the law.

<sup>514</sup> See 'Aid donors blast Cambodia corruption', *dpa* (Phnom Penh) 12 February 2007;

<sup>515</sup> See, eg, 'China pledges USD600 million in aid and loans to Cambodia', *The Weekly Business Press Review* (Phnom Penh) 17 - 23 April 2006; Charles McDermid and Sam Rith, 'China's PM comes laden with gifts', *Phnom Penh Post* (Phnom Penh), 20 April 2006; 'U.S. diplomat says China's role in Southeast Asia often unproductive', *Associated Press* (Washington), 27 July 2007.

<sup>516</sup> Ministry of Planning (MoP), National Strategic Development Plan (NSDP), 2006-2010 (2006).

Paradoxically, the same politicians skillful at resisting and diverting the international development community are just as capable of controlling a largely rural population through demagoguery, false promises and intimidation. The raw power of the state, complemented by fear and the distribution of small gifts and favors at critical junctures, will continue to provide a veneer of political legitimacy. Under this cloak of legitimacy, the rapacious exploitation of Cambodia's economy will continue with unforeseen consequences for the country's political and socio-economic development.

## V. CONCLUSION

In sum, the end of civil conflict has brought about an overall sense of security to Cambodia. Yet, the absence of effective institutions of government, basic laws and an impartial judiciary all leave Cambodia with systemic problems like: entrenched corruption at the highest level; a system based on patronage; pillaging of natural resources; and enrichment of the few to the detriment of the many.

The UNTAC-sponsored elections in 1993, hailed at the time as a notable achievement, established only a weak foundation for democratic institutions. Over the years democracy took root slowly but did not lead to a change in the political culture. The Cambodian experience makes clear that democracy is not synonymous with holding elections, even well-run and peaceful elections. The essence of Western democracy consists of a separation of powers with checks and balances within a system of democratic institutions, political parties, and free elections. The elections led to a reassertion of past political practices, evidencing by the absolutism, nepotism, and intolerance prevalent in the earlier Sihanouk and Lon Nol eras. Cambodia remains a 'fragile state' as it experienced worsening governance in recent years. The issue of limited trust in public institutions remains an issue. To reduce corruption and violence, Cambodia must curb executive powers as it develops an honest, independent judiciary and a concomitant respect for the rule of law.

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## **CHAPTER VIII:**

# **LEGAL AND INSTITUTIONAL DIFFERENTIATION**

## Chapter VIII:

### Legal and Institutional Differentiation

#### I. CULTURE AS THE DIFFERENTIATION FACTOR

##### A. *The Influence of Culture on Economic Development*

Legal convergence and divergence notwithstanding, the observed patterns of change in recent years in Cambodia tend to support the differentiation hypothesis. The Cambodian experience would seem to suggest a mixed outcome. It suggests that culture is important in influencing economic performance and in explaining the Cambodian political culture and institutional system, both of which may have also played a larger role in this process. In the same vein, cultural factors were suggested as one of the major determinants influencing law and legal evolution of the country.

A large literature has explored the links between culture and human progress from various perspectives and extremes. Alexis de Tocqueville, a seminal culturalist, concluded that what made the American political system work was a culture congenial to democracy. Max Weber explained the rise of capitalism as essentially a cultural phenomenon rooted in religion.<sup>517</sup> Since then the cultural theory has resurfaced in various forms. In the 1940s and 1950s, much attention was paid to culture as a crucial element in understanding societies, analyzing differences among them, and explaining their economic and political development.<sup>518</sup> In the wake of the rich literature the scholars produced, work on culture in the academic community declined dramatically in the 1960s and 1970s. In the 1980s, interest in culture as an

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<sup>517</sup> In other words, Weber argues that what initiated economic development was a religious revolution, one in which the treatment of life's winners (the rich) and losers (the poor) was centrally relevant. See Max Weber, *The Protestant Ethic and the Rise of Capitalism* (1904-05) [trans of: *Die protestantische Ethik und der 'Geist' des Kapitalismus*. The English translation was published in 1958 by Charles Scribner's Sons in New York]. Gunnar Myrdal concluded nearly seven decades later that:

...cultural factors, profoundly influenced by religion, are the principal obstacles to modernization. It is not just that they get in the way of entrepreneurial activity but that they permeate, rigidify, and dominate political, economic, and social behavior.

See Gunnar Myrdal, 'Asian Drama, an Inquiry into the Poverty of Nations' (1968).

<sup>518</sup> Among the scholars involved were Margaret Mead, Ruth Benedict, David McClelland, Edward Banfield, Alex Inkeles, Gabriel Almond, Sidney Verba, Lucian Pye, and Seymour Martin Lipset.

explanatory variable began to revive.<sup>519</sup> The renaissance in cultural studies in the 1990s continued to take place and had moved toward the articulation of a new culture-centered paradigm of development, and of human progress.<sup>520</sup>

Increasingly social scientists, journalists, politicians, lawyers, and development practitioners turned to cultural factors to explain modernization, political democratization, military strategy, the behavior of ethnic groups, and the alignments and antagonisms among countries.<sup>521</sup> In the scholarly world, the battle has thus been joined by those who see culture as a major, but not the only, influence on social, political, and economic behavior and those who adhere to universal explanations, such as devotees of material self-interest among economists, of "rational choice" among political scientists, and of neo-realism among scholars of international relations.<sup>522</sup> Moving well into the new Millennium, the battle is far from being conclusive.<sup>523</sup>

The fact remains that most economists are still uncomfortable dealing with culture, particularly since it presents definitional problems, is difficult to quantify, and operates in a highly complex context with psychological, institutional, political,

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<sup>519</sup> The most prominent and most controversial early contribution to this revival was written by a former USAID official, Lawrence Harrison. Harrison used parallel case studies to demonstrate that in most Latin American countries, culture had been a primary obstacle to development. His analysis generated a storm of protest from economists, experts on Latin America, and intellectuals in Latin America. In the following years, however, people in all these groups began to see elements of validity in his argument. See Lawrence Harrison, *Underdevelopment Is a State of Mind-The Latin American Case* (1985). See also his latest releases, Lawrence Harrison, *Who Prospers? How Cultural Values Shape Economic and Political Success* (1992); Lawrence E. Harrison and Samuel P. Huntington (eds), *Culture Matters: How Values Shape Human Progress* (2001).

<sup>520</sup> Ibid. See also Francis Fukuyama, *Trust: The Social Virtues and the Creation of Prosperity* (1995); Landes, above n 458.

<sup>521</sup> For a sociological interpretation of legal ideas see Cotterell, above n 32.

<sup>522</sup> The relationship between institutions and culture is touched on repeatedly in Douglass North. He identifies "informal constraints" on institutional evolution as coming "from socially transmitted information [that is] a part of the heritage we call culture ... [which is] a language-based conceptual framework for encoding and interpreting the information that the senses are presenting to the brain. See North, above n 29, 37.

<sup>523</sup> Nonetheless Dam argues that, irrespective of the various theories:

From the standpoint of a particular country, the debate over institutions versus geography versus social factors makes little difference. Whatever the causes of its low incomes, a country wants economic development. If a country is disadvantaged by its geographical situation, it still will want to develop as rapidly as its circumstances permit. As for social factors, the country's policymakers would probably be unwise to think that public measures could alter social norms, much less culture and religion. But they should nonetheless take these factors into account in adopting new policies.

See Dam, above n 19, 223.

geographic, and other factors.<sup>524</sup> Gunnar Myrdal criticizes anthropologists and sociologists for failing "to provide the more broadly based system of theories and concepts needed for the scientific study of the problem of development" but appreciates that "attitudes, institutions, modes and levels of living, and, broadly, culture ... are so much more difficult to grasp in systematic analysis than are the so-called economic factors."<sup>525</sup> Political scientist Lucian Pye cautioned that "we need to be somewhat humble in ascribing precise weights to cultural variables, and, while we know that they are important, but exactly how important at any particular time is hard to judge.... we are dealing with clouds, not clocks, with general approximations, not precise cause- and-effect relationships."<sup>526</sup>

The economic history of the past century has revealed contentious experiences with regard to the roles of institutions and culture in determining national economic performance, meaning that economic growth could be accelerated or decelerated by institutional and cultural changes.<sup>527</sup> On the one hand arguments varied ranging from a powerful link between cultural values and the political-and economic-performance of nations;<sup>528</sup> to the key role that social capital plays in promoting democratic institutions;<sup>529</sup> to the connection between culture and corruption;<sup>530</sup> to influences of culture on economic development<sup>531</sup> and competitiveness.<sup>532</sup> On the other hand the

<sup>524</sup> A good case at point is when scholars tried to use Confucianism to first explain Asia's failure, then its success, and then its crises. By now there have been many studies of the origins and nature of the Asian financial crisis, and there is a consensus that the nature of government-business relations in the region did contribute to what happened.

<sup>525</sup> Jared Diamond, *Guns, Germs, and Steel* (1997). See also his latest book, *Collapse: How Societies Choose to Fail or Succeed* (2005).

<sup>526</sup> Lucian Pye, "Asian Values": From Dynamos to Dominoes?' in Lawrence E. Harrison and Samuel P. Huntington (eds), *Culture Matters: How Values Shape Human Progress* (2001) 255.

<sup>527</sup> See Yoshihara Kunio, *Per Capita Asia: Why national incomes differ in East Asia* (2000).

<sup>528</sup> Harvard economic historian David Landes elaborated in *The Wealth and Poverty of Nations* that "culture makes all the difference." Ronald Inglehart, who coordinates the *World Values Survey*, argued that there is a powerful link between cultural values and the political-and economic-performance of nations. See <<http://www.worldvaluessurvey.org>> at 30 June 2008.

<sup>529</sup> Francis Fukuyama argued the key role that social capital plays in promoting democratic institutions. He slices culture and focuses particularly on the issue of trust, as the bond that reduces transactions costs. See Fukuyama, above n 520.

<sup>530</sup> See Seymour Martin Lipset and Gabriel Salman Lenz, 'Corruption, Culture, and Markets' in Lawrence E. Harrison and Samuel P. Huntington (eds), *Culture Matters: How Values Shape Human Progress* (2001) 112-124.

<sup>531</sup> Michael Fairbanks and Stace Lindsay stressed that culture is a significant determinant of a nation's ability to prosper because culture shapes individuals' thoughts about risk, reward, and opportunity. See Michael Fairbanks and Stace Lindsay, *Plowing the Sea-Nurturing the Hidden Sources of Growth in the Developing World* (1997).



contention that culture, rather than policies or institutions, is the primary determinant of a country's economic prospects was also found to be wholly unconvincing.<sup>533</sup> Here, the arguments emphatically made the case that differences in ideology and institutions, not differences in culture, were the crucial variable.

All these above factors are obviously generalized and idealized, and the reality of cultural variation is not black and white but a spectrum in which colors fuse into one another. There is a complex interplay of cause and effect between culture and progress, but the power of culture is demonstrable. It is observable in those countries where the economic achievement of ethnic minorities far exceeds that of the majorities, as is the case of the Chinese in Thailand, Cambodia, Indonesia, Malaysia, and the Philippines. Prominent Argentine intellectual and media celebrity Mariano Grondona analyzed and contrasted development-prone (e.g., the United States and Canada) and development-resistant (e.g., Latin America) cultures.<sup>534</sup> He concluded that culture is more powerful than economics or politics. This conclusion notwithstanding problems will arise when an attempt is made to jump all the way from generalized cultural characterizations to economic outcomes without taking into account all the intervening variables and the situational contexts. It is thus safer to say that it is unscientific to try to draw up a universal list of positive and negative cultural values for economic development. What may be positive in some circumstances can

<sup>532</sup> Michael Porter acknowledged that culture influences economic development and competitiveness but stressed that globalization includes cultural transmission that will tend to homogenize culture and make it easier for countries to overcome cultural and geographic disadvantages. See Michael Porter, *The Competitive Advantage of Nations* (1990).

<sup>533</sup> The contention that culture, rather than policies or institutions, is the primary determinant of a country's economic prospects was also found to be wholly unconvincing by Brink Lindsey who argued that:

".....without a doubt, culture is enormously important in influencing economic performance, i.e. the disproportionate contributions made by Chinese minorities to economic growth in Southeast Asia. On the other hand, what is the cultural difference that explains the different economic paths taken by East and West Germany? North and South Korea? Thailand and Cambodia? Chile and Colombia? Great Britain, before and after Thatcher? China, before and after Deng. Yes, within a given set of institutions, results will vary because of cultural differences; and yes, culture can play a role in deciding which sets of institutions are adopted. But in the economic history of the past century, it is emphatically the case that differences in ideology and institutions, not differences in culture, have been the crucial variable. Collectivism cut across all cultural lines in its sweep to power; likewise, market-oriented institutions have been adopted and have worked in all manner of cultural settings. Both the allure of the Industrial Counter revolution and the subsequent quest for relief from its failures have transcended cultural boundaries."

See Brink Lindsey, *Against the Dead Hand: The Uncertain Struggle for Global Capitalism* (2002).

<sup>534</sup> Mariano Grondona, 'A Cultural Typology of Economic Development' in Lawrence E. Harrison and Samuel P. Huntington (eds), *Culture Matters: How Values Shape Human Progress* (2001) 44-55. See also Lawrence Harrison, *The Pan-American Dream: Do Latin America's Cultural Values Discourage True Partnership with the United States and Canada?* (1997). Harrison continues his provocative thesis the most important factor explaining US and Canadian 'progress' and Latin American 'underdevelopment' is 'the contrast between Anglo-Protestant and Ibero-Catholic.

be quite counterproductive under other conditions. Take the ups and downs of the Asian economies. The values of the Asian cultures have remained the same but the contexts have changed, and hence what had been positive outcomes became negative ones and vice versa. It is true that several of the East Asian economies have recovered more rapidly than many expected, and the recovery doubtlessly reflects in part the same cultural factors that contributed to the rapid growth of recent decades.<sup>535</sup>

In the final analysis, given the controversial nature of the culture issue, many scholars were arriving at the same conclusions that cultural values and attitudes counted but remained a neglected factor in human progress.

### **B.     *The Role of "Economic Culture" in the Context of Globalization***

The ongoing process of economic globalization continues inexorably to enable stunning rates of progress in those nations willing to embrace it. At the same time that globalization provides a powerful discipline on unproductive behaviors; it is rewarding productive aspects of economic culture with unprecedented flows of capital, investment, technology, and economic opportunity. The same global economy is also having a positive effect on the institutional framework of a country. While national sovereignty is not absolute as it used to be, as countries retain a considerable degree of autonomy, national variations in institutions will remain considerable. National variations in culture will continue to be even greater, since values, beliefs and tastes are less subject to world standardization than laws and other formal institutions.<sup>536</sup>

Globalization will not eradicate culture, as some have feared. In fact, although global convergence around the economic front is increasing, cultural differences will certainly remain. In a global economy in which so many things can be easily sourced from anywhere, cultural differences that give rise to distinctive products and services can contribute to the specialized advantage so important to improving the prosperity of nations. Perhaps the most basic belief undergirding successful economic

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<sup>535</sup> Lucian Pye, above n 526, 244.

<sup>536</sup> Yoshihara, *Per Capita Asia*, above 527, 11.

development in the age of globalization is acceptance that prosperity depends on productivity, not on control of resources, government favors, or military power, and that the productivity paradigm is good for society.<sup>537</sup>

Michael Fairbanks and Stace Lindsay stressed that culture is a significant determinant of a nation's ability to prosper because culture shapes individuals' thoughts about risk, reward, and opportunity. In their view culture is a broader, macro level variable while mental models are a micro-level variable. Mental models are the underlying beliefs that influence the way people behave. Mental models apply to individuals and groups of individuals and are identifiable and changeable. Culture reflects the aggregation of individual mental models and in turn influences the types of mental models that individuals have. The two are linked in a perpetually evolving system.<sup>538</sup>

## **II. CAMBODIAN CULTURE AND ECONOMIC DEVELOPMENT**

### **A. *Impact of Globalization and Other External Forces on Cambodian Culture***

Cambodian values and attitudes are changing, as the transition to democratic politics and market economics of the past thirteen years suggests. Moreover, several external forces are modifying the country's culture, including globalization of communications and economics. Clearly, the last decade of democratization, free market oriented policies, and sufficient political stability have enable the Cambodians to harness its cultural strengths as a source of growth. Values like emphasis on the future, work, achievement, education, merit, and frugality have gradually resurfaced and displayed its early successful role in the development spectrum. For example, one often hears praises about the 300,000 Cambodian garment workers, ninety percent of them women, as having a very good work ethic. In Phnom Penh and other urban centers the mushrooming of dynamic private businesses is evident, in particular in construction, commerce, cottage industries, and miscellaneous services.

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<sup>537</sup> Fairbanks and Lindsay, above n 531, 15.

<sup>538</sup> Ibid.

The work, motivation and creativity of Cambodian individuals, considered as the principal engine of economic development, have re-emerged and found their embodiment in various traditional cultural forms. These productive aspects of culture have become critical sources of competitive advantage, resulting in new patterns of international specialization in Cambodia's tourism and microfinance industry.<sup>539</sup> The phenomenal annual growth of the Cambodian tourism industry of more than 30 percent for the last several years, from a mere 250,000 tourist arrivals in 1999 to more than 2 million in 2007 is a clear case at point.

The achievements notwithstanding, there is growing recognition that the same cultural beliefs, attitudes, and values placed in a new context of globalization and its new paradigm of prosperity may be the very undermining factors or the chief obstacles to the country attaining sustained economic and social progress. The argument behind such a pessimism is that the same Cambodian cultural characteristics which prevailed in the initial development period, beyond a certain level of economic development, will start to work as a brake on economic growth.

Over the years, the development assistance institutions in Cambodia have promoted an assortment of solutions to support free market economics and political pluralism, including among others, privatization and decentralization, land reform, community and women in development, appropriate technology, and lately, sustainable development with focus on the poor. All of these initiatives have been useful, in varying degrees, but cumulatively, they have failed to produce widespread rapid growth, democracy, and social justice in the country. Till now there remains an explanatory vacuum as to the various causes.

Arguably, the existing general theories of economic growth can offer an outline of what the country needs to do, but cannot explain why it can or cannot do what it needs to do. General theories have to be accepted as the starting point, but they have to be

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<sup>539</sup> Cambodian microfinance institutions (MFIs) were honored for meeting very high standards in financial transparency. In a worldwide competition for transparency awards that drew 175 entries, three out five top awards went to Cambodian MFIs. See International Finance Corporation's Mekong Private Sector Development Facility (IFC-MPDF), 'Cambodian MFIs rated among the best in the world' (Press Release, 7 June 2006). See also United Nations Capital Development Fund, *Global Microentrepreneurship Awards for Cambodia Will Promote Microentrepreneurs Across Country* (2004).

put in the context of a country whose growth needs to be explained. This requires a combination of economic theory and a knowledge of the country. A country is not merely a geographical area, which can be differentiated from others only in terms of language, landscape, and resources. As a nation, a country is an important institutional and cultural bearer. A theory of economic growth has to recognize those national cultural characteristics influencing individual economic behavior as well as the institutional characteristics affecting incentives and property rights.

In order to better understand the economic environment in Cambodia, one needs to look at the broader image of the Cambodian situation, its past, its potential, and its expectations. Cambodia's half century of development can be explained by a combination of three determinants aside from culture. One is the historical heritage from the glory days of the Angkor Era one thousand years ago to a more recent colonial legacy in the first half of the last century; another is foreign dominance and influences from the French, the American, the Chinese, the Russian, the Thai and the Vietnamese; and the third is political leadership from the Monarch in the 50s and 60s to the murderous Pol Pot in the 70s and to the present strong man.<sup>540</sup>

From this perspective culture in itself may not be adequate in explaining the economic development of Cambodia. Without a doubt, culture is enormously important in influencing economic performance but arguably Cambodia political culture and its institutional system may have also played a larger role in this process. Certain social systems have supported modern economic growth, whereas others have not. Precapitalist systems based on serfdom, slavery, inalienable landholdings, and so forth, tended to frustrate modern economic growth. In this century, socialism proved to be a disaster for economic well-being and growth wherever it was attempted. Similarly, colonial rule in the nineteenth and twentieth centuries was generally

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<sup>540</sup> In explaining change in economic history North states:

Institutions provide the basic structure by which human beings throughout history have created order and attempted to reduce uncertainty in exchange.....They connect the past with the present and the future so that history is a largely incremental story of institutional evolution in which the historical performance of economies can only be understood as a part of a sequential story. And they are the key to understanding the interrelationship between the polity and the economy and the consequences of that interrelationship for economic growth (or stagnation and decline).

North, above n 29, 118.

adverse to high rates of economic growth. Cambodia's development path has to a large extent been influenced by these factors.

In the mid 1970s, emerging from the darkest period of its history, Cambodia encountered international neglect and isolation for over another decade. Socialism was embraced not as a matter of choice and the administration inherited a situation where real estate, natural resources, and all substantial enterprises remained under state ownership. To the strains caused by the transition from central planning to a market economy, the burden of the war has been added. Although in many respects the progress made during the past decade in recovering from the devastation of the 1970s has been impressive, in effect, a decade later the economic well-being and the quality of growth has never fully materialized.

Thus the question is not whether culture has a role but how to understand this role in the context of the broader determinants of prosperity and in the extent, and the ways, in which the Cambodian society achieve or fail to achieve progress in economic development. This chapter argues that cultural values do matter in Cambodia in the process of economic development because they shape the way individuals think about progress. In particular, cultural values matter because they form the principles around which economic activity is organized - and without economic activity, progress is not possible. It also explores a subset of this broader concept of culture - the role of what might be termed "economic culture" in economic progress. Economic culture is defined as the beliefs, attitudes, and values that bear on the economic activities of individuals, organizations, and other institutions. Values, attitudes, or mind-sets can be development-prone or development-resistant. The Cambodian culture contains a variety of traditions that give rise to norms of appropriate behaviour and many times at interpreting conflicts. These include laws, customs, local precedents, cultural axioms, folklore, and religious texts, on top of a rich tradition of didactic literature, as well as a wealth of proverbs and moral fables.

## **B. *Cambodian Cultural Attributes and its Impact on Economic Development***

Analysis of the Cambodian culture attributes the country's poverty, authoritarianism, and social injustice principally to traditional cultural values and attitudes which tend to be development-resistant such as the highly centralized and vertical traditions of authority, the focus on the past and present - and not the future, the connections and family, and a belief in sorcery that nurtures irrationality and fatalism. These cultural factors are not definitive but they can at least suggest what it is in the vastness of 'culture' that may influence the way the Cambodian society evolves.

### **1. *Notion of Authority***

Since time immemorial authority in Cambodia tends toward concentration and verticality reflecting the static nature of Cambodia culture. The authority of the rulers, be it as the Prince of the 60s, the President of the 70s, the murderous Pol Pot, or the current Strong Man is similar to that of an irascible, unpredictable God. People are not expected to adapt themselves to the known, logical, and permanent dictates of the law; rather, they must attempt to guess the arbitrary will of those with power; thus the inherent instability of the Cambodian society. In pre-colonial times, Cambodia kings had in theory absolute power. Under the French, contentious politics were forbidden.<sup>541</sup> With the arrival of independence, the Prince retained this aspect of French policy and took up where his ancestors had left off, capitalizing on the deference that characterized Cambodian attitudes toward royalty and toward anyone firmly in command.<sup>542</sup> In mid-1970 when the genocidal regime took over, the intelligentsia, the educated, trained and skilled work-force were virtually and systematically wiped out.

Even after the peace process and the reintroduction of free market and democracy in the early 1990s, Cambodia society still resembles that of a pre-capitalist society where

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<sup>541</sup> See, eg, Tully, above n 47; Collard, above n 47.

<sup>542</sup> A number of writers have written good accounts of the 'Sihanoukist' period between the gaining of independence in 1953 and the Lon Nol coup in 1970. See David Chandler, *A History of Cambodia* (Chapter 11, 'From Independence to Civil War'); More specific works include Milton Osborne, *Politics and Power in Cambodia: The Sihanouk Years* (1973) and Milton Osborne, *Sihanouk, Prince of Light, Prince of Darkness* (1994).

political authority is traditional and arbitrary, unbound by legal restraints.<sup>543</sup> Power is centralized; officials do not live off their salaries, but are ceded control over resources they then exploit; most administrators avoid blame by passing decisions "up the line;" the state monopolizes trade in some sectors, exploits it in others; ordinary people are "subjects," and are expected to pay up and remain quiet; and institutions are managed through patron/client ties. The prerogative of the state to direct and control economic activities in order to promote economic development is seldom challenged.<sup>544</sup> The doctrines of separation of powers and independence of the judiciary, though constitutionally entrenched, have not been institutionally established nor respected. The judiciary is either subjected to direct executive control or is severely constrained in its operations by political and administrative factors.<sup>545</sup>

Some observers view the Government as a single *kh'sae*, a traditional Cambodian patron-client network in which "resources go up, and come down again," and power is held tightly at the center. Thus, when there is land grabbing in remote areas, the only recourse poor people have is to travel to Phnom Penh and make a direct appeal for redress to the Prime Minister.<sup>546</sup> Since the formal end of the Khmer Rouge rule there has been little actual change in the leadership of the regime. The government, party and many leaders in power in the late 1980s remain in control in 2008. They show few signs they are prepared to surrender power. The King, as a constitutional Monarch and often abroad, can do little to moderate regime excesses.

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<sup>543</sup> In explaining the UN's modest record it is worth emphasizing that Cambodia's cultural and socio-economic factors made it difficult for the United Nations to play a more effective role in the country. At the time of UNTAC's arrival, Cambodia had no genuine democratic culture. Between 1946 and 1981, 10 elections for legislative assemblies were held: three before Cambodia gained independence in 1953, four from independence to 1970, one under the Khmer Rouge regime, and one under the PRK/SOC regime. Although the first three elections were considered reasonably free and fair, the subsequent ones were not. See Sorpong Peou, above n 39, 272.

<sup>544</sup> According to a survey conducted in 2000 by the Center for Advanced Study, "most Cambodians still favor feudal or paternalistic local government, over either democratic or authoritarian forms". The majority (56 per cent) of the respondents held a paternalistic view of the government as a father and the people as a child. Only 27 per cent of them believed that government and people are equals, thus reflecting a low level of civic culture in Cambodia. See Center for Advanced Study and The Asia Foundation, *Democracy in Cambodia: A Survey of the Cambodian Electorate* (2001).

<sup>545</sup> See Human Rights Council, *Implementation of General Assembly Resolution 60/251 of 15 March 2006*, above n 432.

<sup>546</sup> Villagers involved in land disputes across Cambodia protested near Prime Minister Hun Sen's residence in Phnom Penh, pleading for the premier's intervention. See 'Villagers flood capital seeking help for land disputes', *Development Weekly* (Phnom Penh) 26 December 2005 - 1st January 2006.



After the 1993 general elections there was high hope for the emergence of a capitalist type of society where the state is bound by the rule of law, social mobility is high, and economic exchange is heavily mediated through market institutions. The international community at large in return for their support for the reconstruction of the devastated country had expected to see the emergence and eventual strengthening of the liberal model of capitalism where the emergence of legal institutions presupposes, above all, horizontal linkages between economic actors. The Weberian notion of calculability as well as the rational choice emphasis on property rights was seen as facilitating these horizontal linkages between economic actors. The expected changes did not happen and social norms, which support hierarchical distinctions, remained heavily entrenched.<sup>547</sup>

A key explanation for the failure in the emergence of Weberian style of capitalist and market economies of Cambodia lies in the existence of vertical relationships between economic actors and the state. These vertical connections take a multitude of forms (a continuum ranging from patron-client relationships to corporatism) and leads to a model of capitalism wherein there is a high degree of interdependence between the state and economic actors. In that context, the development of the Cambodian economy relies more on the close business-government relations and the reliance on personal relationships to provide business transactions.<sup>548</sup>

## **2. *Notion of Social Control***

Impersonal and external methods of social control, such as the rule of law, are still underdeveloped in the Cambodian society. Habits and customs structure the individual's conception of appropriate behaviour towards others in the society; important relationships that must be preserved; sources of authority that must be respected; and the boundaries between what can and cannot be tolerated by the individual or by the group. Relationships between Cambodians can be understood

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<sup>547</sup> See also Sorpong Peou, above n 52.

<sup>548</sup> The Cambodian experience is similar to those of the East Asian economies. Jayasurya argues that '[i]n the case of East Asian capitalism, economic actors are vertically integrated into the state apparatus....Thus, these connections are not horizontal market connections 'but rather involve power asymmetries between individuals and institutions inside and outside of the state structure'. See Kanishka Jayasurya, 'Introduction: A framework for the analysis of legal institutions in East Asia', above n 28, 8.

within a structural framework of class and gender relations, within which individuals pursue strategies to secure their welfare. These strategies can be viewed as a series of investments in economic, social, cultural and symbolic capital. The nature and distribution of these are determined, in turn, by cultural factors, including concepts of rightfulness and of legitimate authority.<sup>549</sup>

Accounts of pre war and post war life raise questions regarding the level of social control over individual behaviour, and how this social control was achieved, suggesting that the source of authority within the family and the nation was not respect freely given, but fear. Fear exerts an enormous drag on Cambodian culture in stifling initiative to cultural innovation and operates as a primary means of social control.<sup>550</sup> Fear has become prevalent in Cambodian society as a product of the war and has become an aspect of the Cambodian psychological make-up. The reluctance to admit and resolve conflict peacefully that is a consequence of this fear, leads to 'use of power' or 'splitting off in a new direction or creating a new alliance' in situations of conflict - tactics that contribute to the factionalisation of society and the use of violence.<sup>551</sup>

The Government/party apparatus routinely co-opts, then uses or ignores, institutions and individuals that may threaten its power. It also expends resources to gain support directly from citizens, by buying votes during campaign periods, and by enticing them to become party members at other times. During elections, support for candidates is routinely bought with gifts of rice and clothing. Parliamentarians have little legitimate power.<sup>552</sup> They receive a relatively generous salary (\$2,000 per month), but

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<sup>549</sup> For an understanding of a broader patterns of relationships within the Cambodian community, see Centre for Peace and Development/Cambodia Development Resource Institute, *An Investigation of Conflict Management in Cambodian Villages: A Review of the Literature with Suggestions for Future Research* (2001).

<sup>550</sup> See, eg, 'Lecturer sacked for using anti-government textbook', *Development Weekly* (Phnom Penh) 4 – 10 September 2006; 'Cambodia: Critical Cartoonists Deterred by Defamation Suits, Imprisonment Threat', *Phnom Penh Post* (Phnom Penh) 18 May 2007; 'Appeals Court denies journalist Mam Sonando bail', *Development Weekly* (Phnom Penh) 7 - 13 November 2005, 5.

<sup>551</sup> See Bit, above n 414.

<sup>552</sup> In August 2006 the National Assembly amended the Law on the Status of National Assembly Members, putting members at greater risk. In derogation of the Constitution as well as international norms, the law imposes extensive qualifications on their immunity with respect to freedom of expression. It subjects members whose comments are deemed to abuse an individual's dignity, social customs, public order and national security to the same legal penalties that already restrict the freedom of expression of Cambodian citizens. The same Law authorizes the arrest of members without prior lifting of immunity. On 15 December 2006, the National Assembly amended article 120

have little scope to criticize or change Government legislation. The national budget is ‘debated’ each year, but MPs don’t ‘interfere’ by questioning specific items or demanding changes. The fact that members of the National Assembly serve at the pleasure of their respective party, and not the citizens who vote for them, is emphasized, as each candidate is required to sign an undated resignation letter before being added to the party list. Parliament has little control over the military or police. As a result, the military remains under direct control of the ruling party, an important facet of systemic corruption, and invaluable resource in maintaining power.

In contrast to the climate of fear affecting most Cambodians, those who live inside or close to the system behave with impunity.<sup>553</sup> Senior officials do not admit any culpability when speaking in Khmer to the Cambodian people. They readily admit to corruption in ministries and courts during discussions with donors, but never admit personal involvement. Rather they dwell on petty abuses, never on grand scale corruption or on their vast personal fortunes that are being built.

### **3. *Notion of Family***

Cambodia’s static cultural attributes emphasize the family as circumscribing the community. The Cambodian society, with a narrow radius of identification and trust, is more prone to nepotism, corruption, and tax evasion. Merit which is central to advancement in a progressive culture is rarely recognized. Personal advancement is often a function of who you know or how much you can pay. Education is the key to progress in a progressive culture but is of marginal importance except for the elites in a static culture.

Compounding these Cambodia’s traditional cultural characteristics reflects the effects of foreign influences over the centuries from the Thai, the Vietnamese, the French, the

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of the Law on Election of Assembly Members, according to which Members convicted of a crime or misdemeanour will automatically lose their seats. See Human Rights Council, above n 432, 12.

<sup>553</sup> Impunity exists where individuals who break the law are exempt from any punishment, and are not brought to account in any proceedings - whether criminal, civil, administrative or disciplinary - or made subject to any penalties, and where no reparation is made to the victims. Impunity has other far-reaching effects insofar as it allows official authority to be abused for personal enrichment or to maintain vested interests by operating outside the law. It also results in the distorted allocation of economic resources, further exacerbating existing inequalities and perpetuating poverty.

American, the Chinese, and the Russian. One of the consequences was the apparent lack of a sense of group responsibility or nationhood. After the purge of the intellectuals and the educated during the genocidal regime, most Cambodian peasants and workers scarcely had a notion of nation. The decade that followed did not bring any new sense of higher duty to the country and to link this patriotism to work. With two decades of frozen anti-market and anti-entrepreneurial attitudes, the survivors fear the uncertainties of the outside and yearn for the safe tedium of their family circle. The collapse of communism, socialism, and the lifting of the economic embargo have led to a rush of business activities, the best of it linked to inside deals, much of it the work of those in power.

The business system produced by relying on family and other personal ties for security had many features in common in Cambodia and throughout most of East and Southeast Asia.<sup>554</sup> The Cambodian businesses themselves, predominantly of Chinese descent, were generally owned and controlled by single families. Symbolic capital which refers to ‘the prestige and renown attached to a family and a name’ is extensively used to access to the networks of social capital. They knew how to operate in a world in which legal contracts were often not enforced. They had established working relationships with the central government and local administrations and could turn to them for help when needed. At a minimum, these close relationships with the authorities could ensure that they would not interfere with business operations. Where personal ties between government officials and businessmen were based on family and family-like relationships (e.g., school ties, origin in the same town or province), the line between the sphere of government and the sphere of business was often blurred.

Compared to forces like discretionary market management, culture, ideology, and relational networks, there is little doubt that universal legal norms played a relatively minor role in Cambodia’s economic and social development. Most market players successfully operate in the shadow of bureaucratic regulation, by relying on structures bound by interpersonal trust, based on kinship, personal, ethnic, military and commercial backgrounds. A review of who benefits from economic land concessions

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<sup>554</sup> Other similar Asian examples include the *Zaibatsu* in prewar Japan, the *chaebol* in South Korea, and clan based trading conglomerates in Singapore.

and other natural resources grants and concessions is revealing. Information available on the Ministry of Agriculture, Forestry and Fisheries website shows that a large number of economic land concessions have been granted in favour of foreign business interests and prominent Cambodian political and business figures, including senators and *oknhas* ('*Oknha*' is a title given to 'any generous person' who contributes \$100,000 to the State, either in cash or materials. The title is bestowed by the King, at the request of the Government). Over 943,069 hectares of land in rural Cambodia have been granted to private companies as economic land concessions, for the development of agro-industrial plantations. Thirty-six of these 59 concessions have been granted in favour of foreign business interests or prominent political and business figures. These statistics exclude smaller economic land concessions granted at the provincial level, for which information on numbers and ownership has not been disclosed.<sup>555</sup> It could also be argued that bribery or the '*relational capital*' has become 'an institutional alternative to developed formal legal and bureaucratic structures. Admittedly, it could be also argued that bribery/cronism and the rule of law may well exist in a complementary rather than in an antagonistic relationship so that it directly generates the modernisation and the growth of capitalism in Cambodia.'<sup>556</sup>

Clearly, the import of cultural dimension negates the logical or causal connection between the development of a Weberian style formal rational legal system and the growth of capitalism. On the contrary, an undeveloped legal system may indeed be regarded as facilitating the growth of networks of personal relationships which are themselves considered integral to the functioning of the Cambodian market economy. Consequently, commercial and business activities in Cambodia are associated more with a combination of '*rule by law*' and '*interactional law*' regimes rather than with Western ideas of '*rule of law*'. From a theoretical perspective, the significance of the Cambodian experience lies in the fact that crucial sectors of the market function

<sup>555</sup> For more see Cambodia Office of the High Commissioner for Human Rights (OHCHR), *Land Concessions for Economic purposes in Cambodia: A Human Rights Perspective*, above n 413; OHCHR, *Economic land concessions in Cambodia: A human rights perspective*, above n 413.

<sup>556</sup> The relationship between senior government officials and business tycoons are regularly covered in the local and international media. See, eg, Shawn W Crispin, 'The rise and rise of a Cambodian capitalist', *Asia Times Online* (Phnom Penh) 1 September 2007; Shawn W Crispin, 'Cambodia's cowboy capitalism', *Asia Times Online* (Bangkok) 13 July 2007.

outside the legal system but rather within the confine of families and their sphere of influence.<sup>557</sup>

The uncertain and ambiguous relationship between the development of market forces and the emergence of the rule of law is clearly demonstrated in the regulation of corporate and personal insolvency in Cambodia. While there is a strongly stated view amongst donors that insolvency should be processed through the legal system ('the rule of law'), in practice, the capacity of the legal system to regulate insolvency is highly limited. They attribute this lack of policy success, to some extent, on the failure of the Cambodian government to develop appropriate judicial and related administrative structures, but more so on cultural factors which often facilitate more informal and less 'legalistic' ways of dealing with business debt.

For nearly a decade, bilateral donors and multilateral agencies have tried to encourage the import of a foreign insolvency regime without much success. Despite the efforts to impose these legal models, local cultural and business traditions continued to play a major part in the handling of corporate debt and no real support was forthcoming from government officials and from the Cambodian business community to push for the adoption of the new law on insolvency.

Insolvency regimes and concepts have not been a traditional part of the economic culture in Cambodia. Relationships, not law, act as a tool or medium for the movement of capital. The so-called remotivation of capital is achieved by the principals involved (the debtor and creditor) conforming to strong social and business norms, a source of which is in particular the Cambodian family firm. The nature of the Cambodian firm is characterized by a personal trust embedded in business relationships, and a traditional reluctance to resort to formal procedures for legal debt collection. Due to the traditionally strong social norm towards repayment and the

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<sup>557</sup> This overlapping sphere of influence is best illustrated by the 2006 elections of senators. A newspaper article quotes the following:

As this Southeast Asian nation welcomes its first class of elected senators, the group that has gotten the most attention is a half-dozen of Cambodia's richest men who spent their careers building business empires and are now representing the ruling party in the upper house of parliament.

See, eg, 'Some worry about businessmen's Senate influence'. *Development Weekly* (Phnom Penh) 30 January - 5 February 2006; 'Businessmen are making a noted entrance to the Senate', *Cambodge Soir* (Phnom Penh) 25 January 2006.

reaching of a personal compromise between creditor and debtor, the role of insolvency professionals, such as lawyers, accountants and regulators, has not evolved in the same way as has occurred in other advanced economies.

#### 4. *Notion of Openness*

Cambodia has a history of mysterious and closed administration and not of openness. Decision making and information has mostly been hidden and not disseminated to the public. Before the French colonialist time, a Divine King ruled Cambodia. The King is not an individual of this earth, but a Divine King descended to earth from the Upper World to rule the people in the Lower World. For the Monarch, the people of the Lower World must not know the Upper World's affairs; they have only to obey. State affairs are secret because it is needed to protect the leader's rights and to preserve the people's unity. If the people were allowed to know things, there would be disruption and thus instability. In order to maintain unity, the leader's affairs must be kept secret. All the State affairs are not comprehensible. They are privy only to a small circle, the Brahmins and Pandits (intellectuals, scholars). This mental concept of the Cambodian people has existed for thousands of years.

During the French colonialist days, this attitude was perpetuated by the French rulers. There was no open policy in ruling the country where the people could know, hear and participate. These secret systems remain present today. During the Pol Pot regime, people were told to act like a *kapok* tree (literally translated as silent). The Khmer Rouge policy for the entire populace was to maintain secrets.<sup>558</sup>

The opaqueness with which public business is conducted continues to the present days. "Whoever has information, has power" as the saying goes. At all levels of the administration, from village and commune up to national authorities, information are kept in secret. Regardless of existing laws or expectations of donors or media, officials regard virtually all documents as privileged. Crucial information is obtained, if at all, through inside contacts or by bribing a gatekeeper. This lack of transparency

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<sup>558</sup> For a perspective of the first history book written by a Cambodian author about the Khmer Rouge regime, see Kamboly Dy, *A History of Democratic Kampuchea* (2007). See 'Cambodian-penned Khmer Rouge genocide history book to be unveiled', *The Associated Press* (Phnom Penh) 22 April 2007.

even extends to information the Government is obligated to make available under agreements with international organizations.<sup>559</sup> Negotiations of oil and gas concession agreements and other large agro-industrial land concessions were held in the utmost secrecy. Impediment upon impediment is piled before those seeking access to public documents. Officials develop ever more intricate, and sometimes threatening, bureaucratic requirements to "apply" for release of documents. What information is appropriate to release is often up to the discretion of the officials. The sensitivity of the information in question is one obvious criteria as is the value assigned and the petitioner's willingness to pay. But even when the potential reward is high, potential purveyors of official documents exercise great care. Were they to betray the trust vested in them by political patrons, they would open themselves to retribution. In general, where information is available, it is edited, censored, and sanitized. In a survey conducted by CSD, 64% of respondents from private sector and NGOs reported being denied when information was sought from institutions, ministries, and departments for the following reasons:

Public bodies did not want to disseminate the information, especially if this cast the government or institution in a negative light; the information asked for relates to powerful people; 'no envelope was given', which is a reference to informal fees; inability to decide and seekers of information were referred to other persons so secrecy was maintained; referred to supervisors and may not necessarily be allowed to meet them; actual or 'real' information was not given; not having or unable to find the pertinent document; supervisors might blame them if they provide information; no formal request (i.e. letters) was submitted; perception that certain information/documents should be kept secret (e.g. draft laws); government workers think that their work is confidential; information sought (e.g. contracts, agreements) is an institutional/company matter or an internal issue; scared that people would learn about democracy and rights; NGOs were not trusted because these organizations always looked for the negative aspect. NGOs were seen as the 'opposition' party.<sup>560</sup>

The situation would be less dire if the press could freely exercise its oversight function. While outwardly, the press enjoys considerable autonomy, in practice few

<sup>559</sup> The National Assembly has approved a controversial law to establish a national archive, which has come under fire for its potential to suppress freedom of information. See 'National Assembly approves controversial archive law', *Development Weekly* (Phnom Penh) 29 August– 4 September 2005.

<sup>560</sup> See Center for Social Development, *Survey Report on Freedom of Access to Information*, above n 421, 21.



media outlets are willing to criticize, or even report on, government excesses. A few radio programs operated by NGOs and financed by international donors are a promising exception. Foreign language newspapers published in Phnom Penh report more or less freely. But, with a limited circulation, mainly to expatriates, they reach only a minuscule Cambodian elite. The Khmer print media and most radio stations are either controlled by the governing party or exercise a high level of self-censorship. Television, the most powerful medium, is a virtual monopoly of the ruling party.

## 5. *Religious Beliefs*

Throughout history, religion has been the richest source of values. Cambodia's philosophical practices of Buddhism have been perceived as being unfavorable to development.<sup>561</sup> In this religious context, the optimist is the person who expects that luck, the gods, or the powerful will favor him or her. Life is something that happens to me - I must be resigned to it. Buddhism does not encourage aggressiveness and does not stimulate the person to do whatever is necessary to assure a satisfactory destiny, and convincing that what he or she does will make the difference. Individual initiative, achievement, self-reliance, ambition - all these are useless in the face of *Karma*.<sup>562</sup>

In rural areas, where eighty five percent of Cambodians live, all good young men used to spend years undergoing a religious apprenticeship in Buddhist monasteries. This period of ripening was good for the spirit and soul and also suited the somnolent pace of traditional economic activity and employment. Despite the urban growth where life moves faster and commerce thrives, few Cambodians have voluntarily adjusted their priorities to move from their prayers and rituals and get back to the real, material world. It is worth noting that Cambodia is relatively prosperous in urban areas, but its

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<sup>561</sup> On Cambodian Buddhism, excellent recent studies include Ian Harris, *Cambodian Buddhism: History and Practice* (2005); John Marston and Elizabeth Guthrie (eds), *History, Buddhism, and New Religious Movements in Cambodia* (2004); Alexandra Kent and David Chandler (eds), *People of Virtue: Reconfiguring Religion, Power and Moral Order in Cambodia Today* (2007).

<sup>562</sup> *Karma* (Sanskrit: *kárma*) is the concept of "action" or "deed" in Indian religions understood as that which causes the entire cycle of cause and effect described in Hindu, Jain, Sikh and Buddhist philosophies. It is usually understood as a sum of all that an individual has done, is currently doing and will do. The effects of all deeds actively create past, present and future experiences, thus making one responsible for one's own life, and the pain and joy it brings to them and others. In religions that incorporate reincarnation, karma extends through one's present life and all past and future lives as well. Source : Wikipedia 2007.

economic gains disproportionately reflect the economic creativity of its small Chinese descent Cambodian minority.<sup>563</sup>

## 6. *Notion of Time*

A progressive culture emphasizes the future while a static culture emphasizes the present or past. The characteristic of Cambodia's traditional cultures is the exaltation of the past. To the extent that the traditional culture does focus on the future, it is on the distant, eschatological future. David Chandler, a famed Cambodian historian, has succinctly made the linkage between recent Cambodian history and the perceptions of its past. In his words :

As they created something known as *Cambodia*, the French bequeathed to the Khmer the unmanageable notion that their ancestors had been for a time the most powerful and most gifted people of mainland Southeast Asia. They also decreed that Cambodia's subsequent attempts to live within its means represented a decline. Cambodians responded to these contradictory signals by using the grandeur of their past as a framework for the present and identifying themselves with Angkor. Since independence, an image of Angkor Wat, the most famous of its temples, has appeared on all Cambodian flags.<sup>564</sup>

Sihanouk, Lon Nol, and Pol Pot shared this vision of Cambodia's past. Sihanouk's worldliness and his sense of realpolitik made him less certain of the efficacy of Angkor than his successors were, although in his visits to the countryside he identified Cambodia's "little people" favorably with the men and women who had built Cambodia's medieval temples. Lon Nol made similar grandiose comparisons, and in 1977, in the course of listing the accomplishments of the Communist Party of Kampuchea (CPK), Pol Pot was optimistic about Cambodia's future, declaring, "If we can build Angkor, we can do anything."

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<sup>563</sup> A World Bank report highlighted the fact that while poverty had declined, inequality had risen dramatically. It noted that, during the last decade, while the per capita consumption of the richest 20 percent of the population grew by 45 percent, the consumption of the poorest 20 percent grew by only 8 percent--in other words, the income of the richest group (predominantly urban and of mixed Chinese descent) grew by about six times the rate of the poorest. See World Bank, *Cambodia Equity Report: Sharing Growth*, above n 113.

<sup>564</sup> Chandler, *The Tragedy of Cambodian History*, above n 48, 6.

## **PART III**

### **CHAPTER IX:**

#### **POLICY CHOICES AND LEGAL REFORMS FOR LEAP FROGGING PROCESS**

## Chapter IX:

### Policy choices and legal reforms for leap frogging process

#### I. ISSUES AND CHALLENGES

Cambodia is one of the few nations in the world where poverty appears to be falling rather slowly even though economic growth is reasonably rapid.<sup>565</sup> To date, Cambodia's economic growth has been relatively rapid but highly concentrated. It has not led to a significant reduction in poverty as reflected in the limited gains in terms of employment or incomes for the poor. The private sector is exceptionally narrowly-based with the garment sector contributing nearly four-fifths of the country's total official exports. Employment and the great majority of enterprises are however numerically concentrated in the agriculture and agro-industry sector, which exports little and has less than half the labor productivity of the garment sector.<sup>566</sup> With 90 percent of the poor living in rural areas where natural endowments are in abundance, Cambodia has not been able to exploit the full potential of the agriculture sector which suffered from low productivity in crops, depletion of resources in forestry and fisheries, and constrained access to arable land.<sup>567</sup> Large land concessions, granted or bought by urban elites, uproot rural communities and expand underemployed urban masses, the results in both cases are socially destabilizing.<sup>568</sup> Infrastructure, while also

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<sup>565</sup> See World Bank, *Cambodia Poverty Assessment (2006)*. According to the report, the living standards for Cambodians have improved over the past decade, with poverty rate falling from about 47 percent in 1993-4 to 35 percent in 2004, thanks in large measure to robust economic growth averaging around 7 percent per year, combined with the restoration of peace, and improved access to services. Though poverty still remains high at 35%, the story is one of high growth and very respectable poverty reduction in a post-conflict setting. On these important outcomes, Cambodia has performed very well.

<sup>566</sup> See, eg, ADB, *Private Sector Assessment and Development Strategy (2004)*; World Bank, *Cambodia: Seizing the Global Opportunity: Investment Climate Assessment and Reform Strategy*, above n 411.

<sup>567</sup> Cambodia's people depend heavily on agriculture, fisheries, and natural resources and its unique eco-system centred on the Tonle Sap Basin. Yet the World Bank's *Cambodia Poverty Assessment 2006* found agricultural productivity to be low. Economic land concessions have not led to increased agricultural productivity or economic growth in Cambodia, and large areas of conceded land have been left idle or under-utilized. See World Bank, *Cambodia Poverty Assessment*, above n 565. See also, eg, ADB, *Environmental Assessment for Cambodia (2004)*; the World Bank, *Cambodia Environment Monitor (2003)*; UNCHR, 'Land concessions for economic purposes in Cambodia: a human rights perspective' (2004) at <[http://cambodia.ohchr.org/report\\_subject.aspx](http://cambodia.ohchr.org/report_subject.aspx)> at 30 June 2008.

<sup>568</sup> According to the Ministry of Agriculture, Forestry and Fisheries in early 2007, from 1992 to 31 December 2006, the Government granted 97 economic land concessions in 16 provinces and municipalities of Cambodia. As of 31 December 2006, 59 concessions remained, 8 covering an area of 943,069 hectares in 15 provinces. This constitutes approximately 5.2% of the total land area in

improving, is still inadequate. The economic and administrative cost of securing political accommodation has been high, as positions in the bureaucracy multiply. Corruption is certainly also very high, as the score in the 2005 Transparency International table indicates.<sup>569</sup> In sum, despite an impressive decline in poverty rates of about ten percentage points during the past decade,<sup>570</sup> achieving many of the Cambodia Millennium Development Goals (CMDGs) still remains difficult.<sup>571</sup>

External threats also loom large for the economy. The loss or reduction in garment exports is one such possibility.<sup>572</sup> The recent sub-prime crisis in the US will have an effect on the purchasing power and trigger protectionist behaviors.<sup>573</sup> Likewise, the recent accession of Vietnam to the WTO has created some significant fear among the garment industry operators.<sup>574</sup>

Cambodia has yet to score in its efforts in broadening the base of economic opportunity and jobs.<sup>575</sup> Economic diversification will require a sharp focus on

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Cambodia, and 14.5% of all arable land in Cambodia.

<sup>569</sup> According to a report of Transparency International (TI), Cambodia received 2.3 out of 10 points on a global rating, and 4.28 out of 10 points on a regional scale for corruption. TI regards a country scoring below three points as plagued by chronic corruption. In the 24-nation Asia Pacific region, Cambodia is ranked 19th, along with Papua New Guinea. Indonesia, Pakistan, Myanmar and Bangladesh follow. Cambodia falls behind Thailand, Laos, China, Sri Lanka, Mongolia, Nepal and the Philippines. See 'Transparency International (TI) determines Cambodia's level of corruption is a chronic disease', *Development Weekly* (Phnom Penh) 24 – 30 October 2005.

<sup>570</sup> The Economic and Social Council of the UN (ECOSOC) has selected Bangladesh and Cambodia, as models of poverty alleviation policies, and requested them to present their success stories at its ministerial-level meeting in Geneva on July 2-5. See 'Bangladesh and Cambodia selected as poverty alleviation model', *The New Age* (Dhaka) 30 Jun 2007.

<sup>571</sup> The CMDGs sets ambitious future development targets for the country, including eradication of extreme poverty and cutting in half the proportion of people who suffer from hunger by 2015. The report concluded that with present trends Cambodia will not meet the Millennium Development Goal of halving poverty by 2015. It argues that meeting the CMDG target of halving the population in poverty by 2015 will require considerably faster economic growth and a more pro-poor orientation to that growth. See World Bank, *Cambodia Poverty Assessment*, above n 565.

<sup>572</sup> See Erika Kinetz, 'Cambodia's garment mills face impasse', *Christian Science Monitor* (Boston) 05 September 2007. Kinetz argues that next year, US safeguards on Chinese garment imports are set to expire and international monitoring of Cambodia's factories, a cornerstone of Cambodia's 1999 trade deal with the US, may also cease. That could spell the end of Cambodia's labor-friendly garment sector, which has been held up as a model by the industrialized world.

<sup>573</sup> 'Nobel Laureate: US economic crisis will affect Cambodia', *Development Weekly* (Phnom Penh) 29 October – 4 November 2007. Stiglitz argues that a 'significant' slowdown in the US economy led by a mortgage crisis will both lower incomes and increase protectionist sentiment, hurting Cambodia's garment industry and requiring it to broaden its industry base. See also United Nations, *World Economic Situation and Prospects 2008*, above n 44.

<sup>574</sup> Viet Nam has been a member of the WTO since 11 January 2007.

<sup>575</sup> See Benjamin Helfrich, 'Amid post-war boom, unemployment stalks Cambodia's brightest', *AFP* (Phnom Penh) 24 October 2007. Helfrich asserted that an estimated 300,000 young men and women are now entering the labor force as a result of the baby boom in the 1980s. This is roughly

integrating agro-industry and other rural firms into urban, and ultimately, in international markets.<sup>576</sup> The challenge for Cambodia in the next 10 to 20 years is to strengthen governance in order to attract more quality private investments and significantly stimulate higher rates of productivity to ensure competitiveness vis-à-vis other countries so that the country can gain from its economic potentials.<sup>577</sup> But it is the development of the oil and gas sector that is perhaps the most important potential opportunity. Production of 200,000 barrels of oil a day could easily provide nearly two billion dollars of net revenue per year - in a \$4 billion economy.<sup>578</sup>

Ironically, the opportunity of greater oil revenues is also a potential threat.<sup>579</sup> A recent Strength-Weakness-Opportunity-Threat (SWOT) analysis highlights that:

If aid has resulted in only slow progress in reducing poverty in recent years, then oil may actually further concentrate and even destabilize the society. Overall, though, the ‘threat’ of oil is that governance would become worse and spending would further concentrate wealth, fund capital flight, and increase social tensions. It is also possible that aid would be reduced. The end of the international conflict period is now over fifteen years ago. The obligations felt by the international community may not hold so strongly after years of poorly used aid and increasing amounts of oil revenues.<sup>580</sup>

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the same size as total employment in the garment sector. Despite its rapid growth in 2004, the manufacturing sector only employed 8% of the labor force of Cambodia.

<sup>576</sup> See Ministry of Commerce, *Cambodia's Trade Integration Strategy* (2007). The study is an effort by the Government to embrace the country's economic challenges and provide positive direction for the development of Cambodia's trade sector. The 2007 Strategy identifies 19 new and current goods and service sectors that provide strong opportunities for Cambodia to build a more diversified export sector.

<sup>577</sup> UNDP Country Director Jo Scheuer points to the changing nature of competitiveness in the global economy and the new demands put on Cambodian exporters. He argues that the ability of Cambodian exporters to compete in world markets on the basis of lower tariffs is fast eroding. It is increasingly necessary for Cambodian exporters to compete globally by meeting high international technical, sanitary, and intellectual property standards, as demanded by consumers in importing countries. See UNDP, ‘The Ministry of Commerce and UNDP Cambodia today launched Cambodia's 2007 Trade Integration Strategy’ (Press Release, Phnom Penh, 05 December 2007).

<sup>578</sup> Early indications suggest that potential oil revenues will be sufficient to substantially improve access to quality health and education, make progress on the CMDGs, help secure the economy's long-term growth, and consolidate the country's long-term stability. See UNDP, *A SWOT Analysis of the Cambodian Economy* (2006).

<sup>579</sup> Ibid, 12.

<sup>580</sup> For some news commentaries, see, eg, Ian MacKinnon, ‘Cambodia welcomes its oil wealth, but will it do more harm than good?’, *The Guardian* (London) 5 March 2007; Carmen J. Gentile, ‘Analysis: Cambodia oil, blessing or curse?’, *UPI* (Phnom Penh) 20 December 2006.

## II. POLICY CHOICES AND POLICY ACTIONS

### A. *Legal Development as the Backbone of Economic Growth*

Moving toward the future, Cambodia could, in a sense, remedy many of its weaknesses and turn them into opportunities. If crop yields are low, then investments in water control and agricultural systems can raise them. If FDI has fallen, then improvements in governance, education and infrastructure can attract more inflows again. But at the end the role of policy and proper policy implementation will prove to be crucial for the sustainable development of Cambodia.

In the process of transforming its economy from a centrally planned to one of a market-oriented economy, Cambodia overcame many challenges. Many good policies were put in place and a multitude of economic measures have been adopted to tackle the myriad of problems of development. While initial performance under the reform efforts is commendable, the pressure remains to sustain the momentum. Beyond the market access opportunities and investment offered by the recent accession to the WTO and the regional dynamism led by China, Cambodia has now a good context to undertake a second generation of reforms, this time focused on enabling broad-based growth.

Ultimately, the two most fundamental aims of the various policy actions combined are the realization of “sustainable economic growth” and “poverty alleviation” for the country. Significant policy actions which should be undertaken in the period ahead must be credible to fully convince investors that Cambodia is now on the path to credible reform and sustainable private sector-led growth. In this context some of the essential requirements for economic growth and poverty alleviation will be dependent on a sound legal and judicial system development, the so called 'Law-Dependent Goods' (LDGs). Examples of the great flexibility that the legal and judicial systems need to adapt a nation's laws to a dynamic economic system are abundant. Broadly speaking, legal and judicial systems in a market economy must (1) establish the standard rules of socioeconomic interaction, (2) set the rules of interaction between the public and the private sectors, (3) enforce these rules through the courts, and (4) resolve conflicts among individuals and groups. More specifically, a modern market

economy needs laws to (1) define rights and market relationships when new forms of corporate structure emerge, (2) provide decisions on contractual obligations that can be extended to new forms of financial instruments as well as tangible and intangible property. The formation of larger markets and the possibility of longer term contracts, both necessary conditions for economic growth, are hampered by an unclear or undefined system of legal rules and by the inconsistent interpretation and application of those rules.<sup>581</sup>

The use of collateral to leverage assets and the predictability of contract are two good illustrations.

### **1. *Use of collateral to leverage assets***

Cambodian citizens and their Government may, for instance, conclude that establishing and maintaining a simple system of collateral to leverage the assets of individuals and micro-enterprises is a *sine qua non* to ensuring growth through private investment and the reduction of poverty. Although other factors may also be essential (flowing from additional analyses of Cambodia's economic, social and political systems), without the ability to leverage assets, significant economic growth through private investment and the reduction of poverty may not be viewed as possible. Since establishing and maintaining a 'simple system of collateral' will unquestionably be a matter of legal and judicial reform, this could well be identified as a LDG.

However, a simple system of collateral to leverage the assets of individuals and micro-enterprises would never work in Cambodia without: (i) appropriate laws governing the ownership of real and personal property and the registration of title; (ii) an established law of secured transactions that permits the giving and taking of secured interests in real and personal (fixed and moveable) property; (iii) a widely accepted system of asset valuation; (iv) a banking/financial system that has confidence in the relevant registration systems, private contracts, laws and enforcement mechanisms and, as a result, is ready to lend to individuals and micro-enterprises on the basis of representations of asset ownership and values; (v) a proper

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<sup>581</sup> See Edgardo Buscaglia and William Ratliff, above n 19, 5.



system to publish and widely disseminated all laws and rules regarding property rights, secured transactions and relevant registration systems; (vi) a system of registries staffed by competent/incorruptible professionals; and (vii) a consistent and impartial dispute resolution mechanisms.<sup>582</sup>

## **2. *Predictability of contract***

Indeed as a further means of ensuring economic growth through private investment, the need for 'predictability of contracts' might be identified by Cambodia as another LDG.

Again, predictability of contracts in Cambodia will never happen without: (i) an established law of contract;<sup>583</sup> (ii) the law of contract being properly published and widely disseminated on a timely basis;<sup>584</sup> (iii) a strict and efficient enforcement of judgments where judgments of the courts in these matters should be written, based on the law, be available for wide publication, and strictly and efficiently enforced;<sup>585</sup> (iv) the law being widely understood and applied, first and foremost by lawyers and judges, and, secondly, by all those interested in contracting;<sup>586</sup> and (v) a consistent and impartial application of the law by competent courts or other dispute resolution mechanisms when breaches of contracts and of the contract law occur.

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<sup>582</sup> For example, in the event of disputes, it is expected that the relevant laws and contracts will be applied in a consistent and impartial fashion by dispute resolution mechanisms in which all involved have confidence due to the impartiality and professionalism of those applying the agreed rules and enforcing the judgments rendered.

<sup>583</sup> The 1988 Decree Law No. 36 on Contract does set out a broadly appropriate framework but no provision of this law has ever been interpreted by the Cambodian courts.

<sup>584</sup> The publication of laws and regulations in Cambodia remains problematic, as does its wide dissemination.

<sup>585</sup> Generally, judgments in civil cases are not standardized. They do not follow precedent and typically are not reasoned (i.e. they make no reference as to how the law has been applied to the facts as established). They are not available for publication and are very often not enforced.

<sup>586</sup> The teaching of law remains basic to practicing lawyers and judges, let alone to economic actors in the private sector.

### III. FIRST POLICY ACTION: STRENGTHENING THE NEXUS BETWEEN THE DEVELOPMENT OF MARKET AND STABLE EFFECTIVE LEGAL REGIMES

#### A. *Policy Justification*

The first policy choice would relate to strengthening the nexus between the development of market and stable effective legal regimes. The policy actions must address issues of economic governance - inadequate legal and inappropriate regulatory frameworks, lack of transparency and access to information – which are critically important in attracting private investment and improving Cambodia's competitiveness.<sup>587</sup> The aim would be to strive to stimulate both the Weberian idea of the legal system providing a calculability and predictability of actors in the market and Douglass North's idea of legal institutions providing a framework for states to provide credible commitments to market-enhancing property rights. Undergirding this policy choice and actions are undoubtedly the need to bring as much, and as close, as possible some convergence of the Cambodian laws and legal institutions to regional and emerging global standards. Ensuring the convergence of the legal framework requires that Cambodia looks at the inconsistencies or gaps in its present legal framework.

The following key issues confronting Cambodia's institutions provide ample justification for such policy actions:

- The legal framework remains incomplete and shortcomings of the law making process, the judicial institutions, and law enforcement are well documented.<sup>588</sup> The current shortcomings of the legislative process result from a number of

<sup>587</sup> See World Economic Forum (WEF), *Global Competitiveness Report* (2007). Cambodia lacks competitiveness in business. Of 131 countries listed in the 2007 Global Competitiveness Index Cambodia ranked 110, lagging behind fellow ASEAN members Singapore (7), Thailand (28), Indonesia (54), and Vietnam (68).

<sup>588</sup> See, eg, Ministry of Justice, *Interministerial Workshop Proceedings on Judiciary Reform* (1995); Gilles Blanchi, 'Retraining Needs for Government Lawyers in Asian Transition Economy Countries' (Paper presented at the Conference on Cambodian Legal and Judicial Reform in the Context of Sustainable Development, Phnom Penh, 8 June 1998); Gourdon et Xavier Ghelber, above n 283; SPM Consultants, above n 416; United States Agency For International Development (USAID), *Southeast Asia Commercial Law & Institutional Reform And Trade Diagnostics*, above n 377; Human Rights Council, *Implementation of General Assembly Resolution 60/251 of 15 March 2006*, above n 432.

factors: (a) limited legislative capacities of the Parliament, both at the lower and upper houses, and line ministries have resulted in a backlog of fundamental economic laws awaiting for drafting and enactment.<sup>589</sup> Significant gaps pervade in the legal framework in a number of sectors, with some over-arching sector laws still in draft. The gaps in the legal framework are repeatedly cited by the private sector as one of the most serious problems for business in Cambodia; (b) limited public consultations in the legislative process that undermines a sense of ownership of the laws and makes their enforcement more difficult; and (c) the extensive use of decrees and sub-decrees persistently bypasses existing legislations and undermines the hierarchy of laws.

- Difficulties exist in identifying what laws are in force. The situation leaves everyone in an intolerable state of doubt as to the law that applies in Cambodia. The lack of transparency in laws and regulations greatly increases transaction costs for business, removes a level playing field for all players including small businesses, and hampers private sector development. Companies have encountered major difficulties in acquiring information about laws and regulations. Numerous administrative orders (sub-decrees, decisions, circulars) are typically issued without prior notice to affected persons or the public. The difficulty appears to be particularly compounded with the irregular publication and inadequate quantities of the Official Journal. Lack of public access to court verdicts, decisions and rulings, or digests of the same creates another layer of uncertainty.

## **B. *Building on Early Legal and Institutional Reforms***

Cambodia is still at the early stages in developing a properly functioning legal system. For the most part, the Cambodian legal framework has had to be almost entirely rebuilt from scratch. In the early days of reconstruction, efforts were extended to fill the gaps in the basic commercial and business laws framework that had adverse motivational effects on entrepreneurs and potential investors. It was recognized

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<sup>589</sup> 'UNDP starts new legislature assistance program' *Development Weekly* (Phnom Penh) 25 June – 1 July 2007. The new project is designed to help the National Assembly committees observe draft laws and the role of lawmakers more effectively, to enhance the abilities of the secretariats of the NA and the Senate.

though that these efforts remained inadequate and non responsive to the requirements of the regionalization and globalization agenda of the country and the rapid development of a vigorous private sector.<sup>590</sup>

Over the twelve years period since the formation of the Government in 1993 many of the laws and regulations that were enacted or adopted were mainly organic laws establishing a functioning administration, laws regulating public finance and financial system, laws regulating the privatization of public sector enterprises and investment, and other fundamental laws related to economic development and economic integration. Accession to the WTO has the effect of pushing Cambodia to accelerate its reform process forward at an even more impressive pace. In 2004, the Government commissioned over 100 separate tasks arising from the protocol of accession to some 20 different ministries and agencies. Prior to that, when negotiations for accession to the WTO were in full swing, the Cambodian authorities committed to adopt 46 pieces of laws and regulations, of which more than 1/3 were already passed as of 2007.<sup>591</sup> The Official Journal was reprinted and works to re-establish other basic elements of a suitable enabling legal environment such as codification of texts were timidly initiated. In the post WTO accession, more legal and institutional reforms were pursued with good results under the U.S. - Cambodia Trade and Investment Framework Agreement (TIFA).<sup>592</sup> Under the TIFA dialogue, Ambassador Schwab stated '[C]ambodia is working hard to put the right policies in place to support an open and welcoming environment for trade and investment....There has been real progress on the ground. We will continue to work together to build momentum to sustain these reform efforts'.<sup>593</sup>

<sup>590</sup> For a detailed listing of the laws and regulations adopted from 1993 to 2000, see Compendium of Cambodian Laws Volumes I, II, and III published by CDC and CLRDC respectively. For the french version of the texts, see *"Les Annales de la Faculté de Droit et des Sciences Economiques de Phnom Penh, 1996, 1997, 1998, and 1999"* published by the Faculty of Laws and Economics.

<sup>591</sup> See Annex 9.1 for update status of the Legislative and Regulatory Action Plan, October 2007.

<sup>592</sup> When Cambodia joined the WTO in 2004 as a least developed country (LDC), it agreed as part of its accession to implement WTO-consistent trading rules over a five-year transition period. The U.S. - Cambodia Trade and Investment Framework Agreement (TIFA), signed in 2006, is the primary bilateral dialogue between the two governments to discuss implementation of these commitments and other trade and investment related issues.

<sup>593</sup> See United States Trade Representative (USTR), 'USTR Schwab Visits Cambodia To Hold First Ministerial Meeting Under Trade And Investment Framework Agreement' (Press Release, 21 November 2007). The ministerial meeting reviewed Cambodia's current efforts to improve trade facilitation, protect intellectual property rights and enhance the attractiveness and competitiveness of Cambodia's investment climate. Discussions focused on marking the progress Cambodia is making in meeting the benchmarks for implementation of WTO-consistent trade practices, as well

## 1. *Completing and Modernization the Legislative Framework*

The policy action should aim at solidifying Cambodia as a "State of Law" in which the rule of law prevails. The work should entail the enactment and amendment of laws and regulations to reflect the realities and needs of a liberal market economy, particularly to guarantee private ownership and the sanctity of contracts, as well as to create an environment conducive to the progress of a democratic society. These changes demand a legal framework that would provide flexibility for market agents and stable institutions to enforce contracts and property rights and enhance the predictability, transparency, and accountability of state actions. Concretely, it would mean completing the current legal framework with either new enactment or amendments of laws and regulations aimed both at (i) the reform of the rule of law, and (ii) completing the sectoral legal framework.

(a) *Completing the 'Rule of Law' framework:* The thrust of this policy action would be to promulgate or amend a body of laws and regulations to complete the current legal framework. The work would also entail the reform of judicial procedures. Of particular importance are laws that provide for the proper functioning of the courts (i.e. Law on the Statute of Magistrates, Law on the Statute of Court Clerks, Law of Evidence,<sup>594</sup> Civil Code<sup>595</sup>, and Criminal Code and Criminal Procedure Code<sup>596</sup>); laws that protect basic economic rights, assets and interests of the private sector (i.e. the Civil Code and the Criminal Code); laws that strengthen the judicial system relating to commercial activities (i.e. Law establishing Commercial Court, Decree establishing Commercial Arbitration Center); and laws that provide a

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as highlighting areas where additional work remains to be done. The two countries also agreed upon a plan of action which will add momentum for trade-related reforms within Cambodia.

<sup>594</sup> The drafting of the Law of Evidence has yet to be initiated. The lack of a law on evidence raises some troubling issues for the Cambodian legal system: forensic and other physical evidence are rarely collected, defendants are detained without immediate access to counsel or family, and trials are frequently conducted without witnesses. Self-incrimination is not the exception but a well-established rule in Cambodia.

<sup>595</sup> The Civil Code was sent to the National Assembly in December 2006.

<sup>596</sup> The Code of Criminal Procedure is pending approval by the National Assembly. The code which contains more than 900 provisions provides a comprehensive series of rules for how suspects should be treated, and how judges, prosecutors and defense attorneys should proceed, from the time of arrest until the final appeal.

framework for good governance and accountability in the public sector (i.e. Law on Administrative Complaints).

These core laws represent an essential reform for the court system which currently operates without well-defined or well-respected pretrial, trial, and sentencing rules and procedures, most of which derive from Cambodia's previous socialist legal system. The enactment of these drafts, a monumental challenge in itself, will remove the ambiguities and inconsistencies as found in the current antiquate 1993 Law on Criminal Procedures of the State of Cambodia, and the 1993 Provisions on Criminal Law adopted during the UNTAC period.

*(b) Completing the sectoral legal framework:* One essential prerequisite for private sector growth is a sound legal framework. The private sector mobilizes human, physical, financial, and technical resources to make profits and accumulate wealth. Businesses need rules that guarantee property rights, regulate anticompetitive conduct, resolve commercial disputes, and limit State interference. Increased reliance on market-based transactions among independent contracting parties requires a functioning system of commercial laws with adequate means for the resort to remedies. The experiences of many developing countries suggest that the absence or inadequacy of laws and enforcement discourage and distort trade and investment, raise transaction costs and risk, foster corruption, and generally hinder private sector development.

Delays in the past in the enactment of these laws had the effect of undermining investor confidence and restricting the ability of the economy to expand. Recent experiences in the region have demonstrated for example the extent to which the absence of orderly and effective insolvency procedures can exacerbate economic and financial crises. The Parliament's delay in adopting the Insolvency Law added another element of risk to an already uncompetitive market environment. The delay of the enactment of the Law on Commercial Enterprises held back the passage of the Law on Capital Markets, while implementation of land titling is needed before steps can be taken to pass a mortgage law. Mechanisms for enforcement of the Land Law through securing land tenure, reducing land conflicts and facilitating land management remain a major problem facing the private sector.

In the financial sector, access to financing remains an important obstacle to the development of the private sector. Uncertainties regarding the enforcement of security interests impede bank lending and contribute to poor asset quality. The present collateral registration system is unreliable because of the absence of a legal basis for secured transactions and bankruptcy and an inadequate public registration system that specifies lenders' positions and priority rankings in secured property. The central bank is unable to provide liquidity services to banks to meet temporary liquidity shortages due to the lack of a negotiable instruments law. While leasing would provide an alternative to long-term bank financing, the lack of a developed framework for leasing prevents banks from entering this business. Thus the thrust of the policy action would be to complete the body of laws and regulations necessary for the good and efficient functioning of a free market economy.

Cambodia does not have a modern legal system in place to support the use and enforcement of commercial contracts. The current Decree on Contracts was passed in 1988, before the transition to a market economy had begun. The contract law is long overdue for revision or replacement. Cambodia is not a member of the U.N. Convention on the International Sale of Goods, and the government does not appear to consider this matter to be urgent. Cambodia has no bankruptcy law. Creditors are not well protected in Cambodia and business failures lead to a scramble between shareholders seeking to make away with business assets and creditors attempting - usually unsuccessfully - to secure them. This leads to increased uncertainty and risk in lending, which in turn tends to dissuade domestic and foreign investors. The current draft law includes a clear hierarchy of creditors' rights, clear powers and duties of administrators, and a rehabilitation process for saving viable businesses. There is currently no comprehensive competition law in Cambodia. Certain laws, however, have competition-related provisions: The Constitution, for example, establishes a market-based economy and requires the state to respect markets in order to guarantee a better standard of living for the Cambodian people; Bid-rigging and other collusive behavior is prohibited by the 1995 Sub-decree on Public Procurement and is punishable by both criminal and civil penalties; The Investment Law guarantees that the Government will not impose price controls on products or services of those who comply with the law, and provides for equal treatment of domestic and foreign investors.

The Government should push ahead as a matter of urgency to tackle the backlog of fundamental economic laws waiting for approval. Concretely, the development or completion of a body of laws, regulations and procedures necessary for the good and efficient functioning of a free market economy will have to incorporate the following:

- laws that encourage lending by financial institutions (i.e. implementing regulations of the Law on Secured Transactions; Law on Commercial Contract; Law on Leasing; etc.);
- laws that deal with securities, shareholders' rights, bankruptcy: (i.e. Law on Insolvency; Laws on Government Securities and Non-Government Securities);
- laws that provide a level playing field for the functioning of the private sector; (i.e. Law on Competition; Law on Anti-Corruption; Other intellectual property rights laws); and
- laws that govern key economic sectors like: energy (oil and gas) and utilities (Water Resources Management Law); transportation (Law on Air Transport, Merchant Shipping Law, Maritime Law); communications (Law on Telecom); commerce and industry (implementing regulations of the Law on Customs and the Law on Metrology and Standards).

Conversely it entails also the repeal or amendment of many other legislations which go against the spirit of the free market and liberal democracy, i.e. the repeal of the Notary Law.<sup>597</sup> With the completion of these tasks, the Cambodian trade regime will come progressively into full compliance with WTO rules, and the legal environment for businesses will approach international norms. It is when this happens that Cambodia will reap benefits from joining WTO.

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<sup>597</sup> The legacy of Cambodia's centrally planned economy appears in various forms. Most relevant for competition policy is that state intervention - though in many forms obscure and indirect - continues to play a paramount role in shaping the economic and legal institutions of the country. The notary monopoly is such a case.



## 2. *Strengthening the Legislative Drafting Process*

The legislative drafting process in Cambodia needs reexamination and clearly is due for reform.<sup>598</sup> Following WTO accession, however, the country's legal infrastructure has remained markedly stagnant. Although some of these laws may be closer to completion than others, the laborious, bureaucratic, and highly political lawmaking process in Cambodia means that many laws remain stuck in the drafting process for up to a decade or more. Unlike Vietnam and Laos, the fact that Cambodia does not operate under the influence of a single political party means that laws will necessarily take more time to be enacted and will involve more negotiation and compromise. Furthermore, the law making process is hampered by political infighting, preservation of personal interests, and duplicative bureaucratic processes.

A long legislative drafting process is not a bad thing in itself as long as it entails many positive and democratic steps, including consensus-building, solicitation of input, public education and outreach and institutional capacity building of legal professionals. Of particular interest is the meaningful involvement of supporting institutions.<sup>599</sup> Where there has been “buy-in” from affected constituencies, a law and its commensurate system for implementation are more likely to be understood, to be used properly, and to achieve their overall purpose.

In fact, stakeholder input into the legislative drafting process is one area where representatives of the private sector expressed satisfaction. Representatives of the investor community generally pronounce themselves satisfied with the opportunities they have to comment on the emergence of law and policy. Since 1999, the government has instituted two mechanisms for the private sector to influence the development of law and policy: the Private Sector Forum and the Working Group Process. Seven Working Groups address the following issues: agriculture, export processing, banking and finance, infrastructure, tourism, manufacturing and distribution and cross-cutting issues of law, tax, and good governance. The Working

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<sup>598</sup> See analysis of the shortcomings on page 237-238 of this chapter.

<sup>599</sup> Supporting institutions could be defined as an ensemble of organizations, entities, or individuals, without which the legal framework or policy agenda cannot be fully developed, implemented, or enforced. Examples include notaries, lawyers, banks, business support organizations, professional associations, universities, and similar ancillary service providers.

Groups are co-chaired by the respective minister involved in the subject matter and meet monthly. The topics they address form the substance of the bi-annual Private Sector Forum which meets every six months with the entire Council of Ministers with the entire session nationally televised live.

The Garment Manufactures Association of Cambodia (GMAC), which accounts for about 90 percent of exports from Cambodia, is enormously vocal and influential with respect to all commercial legislation that is considered or enacted in Cambodia.<sup>600</sup> Among Cambodia's strengths is the vibrancy of emerging national associations and business support groups. At the provincial level, small business associations are becoming increasingly active, generally with the support of the donor community. In addition to the Phnom Penh Chamber of Commerce which assumes the role as the national body 10 provinces now have their own chambers of commerce.

Cambodia has also a thriving civil society organizations which are active in lobbying for legislative and judicial reforms.<sup>601</sup> In the area of labor and other social legislations, the influence of the unions are increasingly felt.<sup>602</sup> There is an active media which varies in quality and independence. On the whole, Cambodians have relatively good and free access to information about news covering the law making process, though this does not necessarily translate, however, into an expectation or demand for reform.

### **3. *Access to Information***

The rule of law presupposes not just the existence of a set of rules but also that they should be known in advance so as to facilitate the proper application of the law. It is not enough to have in place an adequate body of rules; equally important is the need to publish those rules and bring them to the knowledge and attention of the population. Publication of laws facilitates the proper application of the law by

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<sup>600</sup> Other investor groups include the International Business Club of Cambodia (<<http://www.ibccambodia.com>> at 30 June 2008) which largely represents the multinational companies in Cambodia, the Thai Business Council, the Chinese Chamber of Commerce, the Japanese Business Association, the Malaysia Business Council, and the Taiwan Business Council.

<sup>601</sup> The 3 most active organizations are the Cambodian Defenders Project (<<http://www.cdpcambodia.org>> at 30 June 2008), the Legal Aid of Cambodia (<<http://www.lac.org.kh>> at 30 June 2008) and the Center for Social Development (<<http://www.csdCambodia.org>> at 30 June 2008).

<sup>602</sup> There are currently 245 registered trade unions, 218 of which are in the garment sector.

tribunals, enforcement agencies and other interested parties. It serves to bring out contradictions and inconsistencies, which would otherwise not be apparent amongst different legal and regulatory instruments.

Access to information is vital for efficient planning and implementation of business activities in a competitive market economy. It helps to build confidence in the system amongst investors and the international community in general. Information about laws and regulations is particularly important because they set "the rules of the game" for all players in a market economy. Thus, transparency in laws and regulations greatly reduces transaction costs for business, provides a level playing field for all players including small businesses, and facilitates private sector development. Interviews with business groups made clear that Cambodia's public sector has paid insufficient attention to improving transparency in laws and regulations.<sup>603</sup>

In fact, Cambodia has fully adhered, at least on paper, to this basic constitutional principle. Article 93 of its Constitution provides in effect that laws, which have been promulgated by the King are to be published in the *Official Gazette* and brought to the knowledge and attention of the population. Although article 93 is viewed as requiring that no normative act having binding effect is enforceable prior to its publication in the *Official Gazette*, this requirement is routinely ignored.

The thrust of the policy action should be to promote wider dissemination of laws and regulations to enhance transparency and predictability. Moving forward, there is clearly a need for the Government not only to strengthen but also to take urgent steps to sustain the *Official Gazette* as a constitutionally required publication. The *Official Gazette* should be published regularly and without interruption in adequate quantities to satisfy the demand both in urban and provincial areas. Because the publication is done in the national language and the organizational structure is already in place, the efforts to revive it should be minimal. The decision of the Government to upgrade the status of the *Official Gazette* Office to a Department is a sign of progress.

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<sup>603</sup> See Leila Webster and Don Boring, above n 411. Present throughout the survey was a theme actually mentioned explicitly by some managers: Cambodia's lack of good, readily-available business information... including government regulations.

#### IV. SECOND POLICY ACTION: TACKLE THE PROBLEMS OF WEAK INSTITUTIONS AND LIMITED MECHANISMS OF ACCOUNTABILITY

##### A. *Policy Justification*

The second policy choice would relate to tackling the problems of weak institutions and their limited mechanisms of accountability. The thrust of the policy actions should aim at: (1) reforming the legal environment to strengthen institutions capable of implementing laws in an efficient and transparent manner and supportive of economic diversification and growth; and (2) addressing “behind the border” investment climate constraints by substantially removing governance-related constraints that limit firms' productivity.<sup>604</sup>

Weak institutions and limited mechanisms of accountability, which are legacies of Cambodia's recent history, contribute to high level of corruption. Most institutions in Cambodia were barely functioning when the Government began its first mandate in 1993. Although Cambodia has made important progress in rebuilding institutions, the country continues to operate far below its economic and social potential due to weak governance. The justification for policy actions could be traced back to the enormous contributions of multi and bilateral donors in assessing the foundation for private sector development.<sup>605</sup> Taken together, the collective work represents a consensus that:

- the lack of credible legal institutions, including judicial and enforcement institutions has restricted the ability of the financial sector to expand and the willingness of foreign and domestic investors to commit to the development of Cambodia;

<sup>604</sup> Cambodia has again fared poorly in the World Bank-International Finance Corporation (IFC) annual ‘Doing Business’ report, which ranks countries on the ease of starting and operating businesses, remaining at 145 out of 178 countries surveyed. See *Development Weekly* (Phnom Penh) 1 – 7 October 2007.

<sup>605</sup> Five important studies are worth recognizing: (i) JICA, *Comprehensive Study on the Regional Development of the Phnom Penh-Sihanoukville Growth Corridor* (2003); World Bank PPIAF, *Private Solutions for Infrastructure in Cambodia* (2003); World Bank, *Toward a Private Sector Development Strategy for Cambodia: Value Chain Analysis* (2003); World Bank, *Seizing the Global Opportunities: Investment Climate Assessment & Reform Strategy*, above n 411; Asian Development Bank, *Private Sector Assessment and Development Strategy* (2004).

- the regulatory environment creates significant opportunities for corruption that divert resources from the state and poses the biggest obstacle to the private sector;
- cumbersome and costly licensing and registration processes hinder formalization;
- closed, non-transparent processes undermined the value of public private partnerships, and fundamental changes to the regulatory environment are needed to introduce transparency, predictability, competition, and accountability;
- costly and inefficient ‘behind the border’ processes, and excessive controls needs to be replaced by a trade facilitation approach in order to support a trade-led growth strategy; and
- the private sector has an important role to play in its own governance, institution building and learning processes, particularly given the limited capacity of the state.

All of these served to significantly increase transaction costs, weaken business confidence, productivity, and competitiveness of the economy.<sup>606</sup> Cambodia has yet to score in its efforts in removing impediments in the following areas.<sup>607</sup>

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<sup>606</sup> See ‘Unofficial costs plague local small-scale businesses’, *The Commercial News* (Phnom Penh) 4 October 2006. According to the article, undocumented graft and non-transparent tax policies are among several obstacles plaguing small scale Cambodian enterprises. Among the greatest problems slowing productivity are: Unofficial government corruption, non-transparency of the taxation policy, inefficient controls on smuggling, a lack of information, an expensive power supply and inconvenient transportation.

<sup>607</sup> The results of a survey based on interviews with 500 business leaders in 10 provinces are revealing. Priority areas for improvement in all ten provinces were costs of starting a business, property rights, transparency (specifically access to information on regulations), participation in policymaking, informal charges, and crime prevention. See IFC-MPDF and The Asia Foundation, *Provincial Business Environment Scorecard (PBES)* (2006).

## 1. *Burdensome regulatory oversight on enterprises operations*

Many constraints affecting the operations of enterprises are the result of having several government authorities involved in licensing and regulatory oversight. Manufacturers face many inspections from several ministries some of which have overlapping functions. Entrepreneurs spend much time and money dealing with administrative red tape. Good governance is needed to reduce the cost of operations and the uncertainty of investment.<sup>608</sup>

## 2. *Excessive constraints on trade*

Within Cambodia's regulatory environment, import and export processes were identified as having the highest unofficial costs. The cause of high trade costs was not related to anyone particular institution, but rather the cumulative impact of overlapping institutions, each of which required streamlining.<sup>609</sup>

Trade and investment are closely linked and complementary activities for modern business operations. For potential foreign investors, the ability to import and export easily is an important aspect of the investment climate. For existing exporters, particularly the garment sector, export processing is a major concern due to the level of government intervention. Not only are there many formal and informal costs involved, but there are significant delays caused by administrative burdens that increase the lead-time of production and the risk that shipments will be delayed.

For industrial enterprises improved access to inputs of raw materials and semi-finished products is needed to improve competitiveness. These fees create a disincentive for investment by increasing the cost of production and reduce the

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<sup>608</sup> For more on Good Governance, see Cambodia Development Resource Institute, *Cambodia: Enhancing Governance for Sustainable Development* (2000).

<sup>609</sup> A 2003 Value Chain Analysis conducted by the World Bank found that the cause of high trade costs was not related to anyone particular institution, but rather the cumulative impact of overlapping institutions, each of which required streamlining. See *The Weekly Business Press Review* 11 - 17 October 2004, 6. Adam Sack, General Manager of MPDF, stated that although agriculture and agribusiness have good potential for contributing to economic growth and reducing poverty Cambodia, "entrepreneurs have been deterred from making the necessary long-term investments due to ill-defined property rights and poor governance. The risks in agriculture and agribusiness are great enough without having to worry about one's property being taken over or the unpredictable cost of unofficial fees. See IFC-MPDF, above n 47.

competitiveness of Cambodian products. The development of export processing zones could have a positive impact for some businesses, but should not replace efforts to limit government intervention throughout the economy. Policy reforms to reduce formal and informal fees of all aspects of business operations are needed.

### **3. *Pervasive smuggling***

The private sector identifies smuggling as the most significant issue manufacturers face in maintaining competitiveness. The problem persists mainly due to the following: the country's long porous borders which are difficult to monitor; fairly high tariffs on imported consumer goods and petroleum; and the low salaries of border guards and customs officials which increases the incentive for smuggling. The private sector claims that negligible movement regarding the prevention of smuggling has been seen and that it is causing substantial disruptions to the business viability of many manufacturers. Smuggling is a major issue, not only for trading companies and international manufacturers, but also for local producers who are affected by the unfair competition. The argument goes along the line that since local companies must pay tariffs, excise taxes and VAT on their imported inputs and equipment, it is difficult for them to compete with finished products flowing into the country tax-free.

### **4. *Impediments to access to FDI***

The Law on Investment (LoI) which provides tax incentives for promoted industries was amended with the purpose of streamlining investment approval procedures. The amendments, while affirming the mandate of the Council for the Development of Cambodia (CDC) to act as a "one-stop" shop for investors to obtain necessary approvals from relevant ministries, set a deadline of 28 working days for the CDC to obtain these approvals. While the deadline setting is an improvement, difficulties in implementation continue to arise from the fact that relevant ministries can still delay the issuance of necessary licenses "with proper reason." In practice, it is not unusual for an investor to receive an investment license from the CDC without actually obtaining the necessary operating licenses from various relevant ministries.

## **5. *Weak private participation in infrastructure***

The Government has illustrated its reliance on the private sector through its massive privatization, corporatization and liquidation of state owned enterprises. Unfortunately, current institutional framework for private participation in infrastructure (PPI) remains weak. Few if any concession agreements or negotiated contracts have been made available for audit or public scrutiny. Consequences of these problems include non-bankable projects, higher than necessary prices to consumers in the Cambodian economy, and a lack of information on the value-for-money received by the public and the Government from infrastructure projects.

### **B. *Building on Early Reforms of the Investment Climate and Private Sector Development***

Since 1993, the Government has progressively introduced and implemented an administrative reform program with a view to improving the capacity and effectiveness of its public sector. The Government has attempted to articulate at the outset a comprehensive plan to reorganize its administration capable of responding to the needs of a democratic and pluralistic society operating in a free market environment.<sup>610</sup> Fundamental legislation was enacted or adopted over the years. While the noble objective of the reform programme was to adapt the civil service to the needs and means of the nation so that it becomes an effective instrument of public policy, the reform has met with mixed results due to the lack of political will. In a limited number of areas where political will exists, positive results were visible.

Moving forward, governance and transparency issues will remain at the forefront of Cambodia's reform agenda. Unless the Government makes progress in reforming governance, efforts to reform other areas of the economy will be limited. Moreover the discovery in late 2004 of potentially significant reserves of oil and gas off the coast of Cambodia presents potentially major opportunities for the country's socio-

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<sup>610</sup> See Council for Administrative Reform, *Governance Action Plan* (2001). The GAP is a rolling strategic framework that provides for a consistent and transparent approach to coordinate efforts better in eight priority areas of reform such as legal and judicial reform, administrative reform and deconcentration, decentralization and local governance, public finance reform, anti-corruption, gender equity, demobilization and armed forces reform, and natural resources management reform.



economic development, but also some potentially major challenges. Effective management of these potentially large inflows could provide resources for needed investments to help Cambodia reach its development goals, as well as provide a national endowment that might be used to support Cambodian development for generations to come. Conversely, ineffective management of these resources could bring on macroeconomic problems and aggravate corruption. Concretely, the followings five key actions should be worth pursuing:

## 1. *Streamlining trade facilitation and lowering the costs of investment*<sup>611</sup>

In 2004 the Government has elaborated a private sector development strategy and a Special Inter-Ministerial Task Force (SITF) was appointed by the Prime Minister to respond to the challenges of improving the investment climate. In 2005, the Government has completed technical work that would introduce an enhanced customs declaration to serve as a Single Administrative Document, replacing 45 documents that are currently involved in an import transaction.<sup>612</sup> The Ministry of Commerce has substantially reduced the cost and time required to register a business. The cost to register has been reduced by over \$400, while the minimum deposit requirement has been reduced from approximately from \$5,000 to \$1,000. Moving forward, speeding up reforms in licensing, inspections and import and export facilitation would be a major improvement to the business environment.<sup>613</sup>

## 2. *New investment promotion strategy*

<sup>611</sup> This refers to the costs of doing business, e.g. the costs of complying with the policy, legal and regulatory frameworks in which the private sector operates, including the extra costs created by inadequate infrastructure, crime, corruption and excessive red tape.

<sup>612</sup> The SITF determined, inter alia, to create a cross-agency reform team, consolidate inspection mandates across agencies, introduce selective inspections based on risk criteria, reduce documents to a Single Administrative Document, introduce a Single Window process, and reengineer and automate procedures.

<sup>613</sup> Cambodia has implemented already a number of key reforms, including setting time limits on obtaining business licenses. Overall the reforms have reduced delays by 66 days. Other key regulatory changes included revisions to customs regulations which reduced the time to export by seven days and the time to import by 10 days. Over two years, the performance measurement system shows significant reduction in time spent by businesses for import and export transactions with government agencies, and also a decline in informal fees. For example, times to import declined from 30 days in 2003 to 10.5 days in July 2005, and time to export declined from 6.6 days in 2003 to 20 hours in July 2005. Informal fees declined from 5% per total consignment value in 2003, to 2% in July 2005. For more see International Finance Corporation and the World Bank, *Doing Business 2007: How to Reform* (2007). The report is available at <<http://www.doingbusiness.org>> at 30 June 2008.

In recognition of the problems associated with the current investment incentive regime, a number of changes to the LoI have been amended. Broadly speaking, changes to the LoI sought to rationalize the investment regime so as to limit discretion, improve transparency and reduce the administrative burden of the current LoI. The Amended LoI explicitly moves the CDC toward serving as a facilitative and promotional agency, with many evaluative and regulatory functions replaced by automatic systems. There is some improvement in inter-ministerial coordination and some streamlining of unnecessary or redundant licensing and inspection requirements. It remains to be seen whether the CDC and the relevant ministries involved will be able to shift its processes and mindset to meet the spirit and the letter of the amended law.

### **3. *Enabling private participation in infrastructure***

The power sector is well-developed from a regulatory standpoint and is a good illustration of the positive effect of a combination of market opportunity and adequate legal framework. A new Electricity Law was enacted in 2000 and a new regulatory body, the Electricity Authority of Cambodia, was established. The law follows international best practice by separating the roles of policymaker and regulator and placing the latter with an independent body. Broadly, it takes the form of redefining the role of the state away from resource-intensive roles and towards policy setting and protecting service delivery standards. Unfortunately, the power sector seems to be the only sector where there is a clear political will to strengthen the role of the private sector in public service delivery through better targeting of public resources and improving transparency and competition. The recent adoption of the Policy on Private Participation in Infrastructure (PPI) and the enactment of the Law on Concessions marked another milestone toward a better process for planning, approving, awarding, negotiating, and managing PPI investment.

### **4. *Addressing corruption as a cross cutting issue:***

Another important concrete action should be to address corruption as a cross cutting issue. The passage and implementation of a new anti-corruption law that meets

international standards should be a priority. The existing draft Anti-corruption law needs to be brought into compliance with international standards embodied in the United Nations Convention against Corruption.<sup>614</sup> When enacted, the new law will be critical in combating corruption. An independent Anti-Corruption Commission should be set up that has the full authority to enforce the law without fear or favour. The National Audit Authority (NAA) will need to strengthen the public oversight of government financial management as well as enforcing regulations meant to decrease corruption in public procurement.

The Law Governing the Civil Service should be amended to ensure the political impartiality of civil servants and to safeguard their integrity and accountability as well as to provide just rules of recruitment and promotion on merit. The government should ensure that civil servants receive a realistic and equitable salaries that are commensurate with a professional position of honor and trust, that can attract high quality personnel and support a reasonable standard of living without the need for corruption. Codes of conduct should be introduced, implemented, and enforced as they are essential to good governance and necessary in developing accountability and responsibility in the government.

On a longer time frame is the process of influencing the change of people attitudes and behavior toward corruption.<sup>615</sup> Already efforts to decriminalize defamation<sup>616</sup>, the

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<sup>614</sup> The United Nations Convention Against Corruption (UNCAC) is a benchmark agreement among nations and an alliance to address the global issue of corruption. At the time of the convention's adoption by the UN General Assembly Secretary General Kofi Annan stated that:

such a convention "reaffirms the importance of core values, such as honesty, respect for the rule of law, accountability and transparency, in promoting development and making the world a better place for all." He also acknowledged that anti-corruption measures "can make a real difference to the quality of life of millions of people around the world....and by removing one of the biggest obstacles to development it can help us all achieve the Millennium Development Goals".

<sup>615</sup> Prime Minister Hun Sen appealed to commerce officials to realize their planned reforms and "change attitudes" on trade facilitation to attract investors. He stated that reforms that are only on paper are totally useless. See 'Hun Sen tells commerce officials to change attitudes', *Development Weekly* (Phnom Penh) 13 - 19 February 2006.

<sup>616</sup> This is a good case where clear political commitment of the Government has triggered a series of events leading ultimately to the demise of the criminalization of defamation. Starting with a statement of the Prime Minister on 14 February 2006, the Council of Ministers met on 21 April to approve the removal of prison sentences from the UNTAC Law followed on 26 May by the amendment by the National Assembly of article 63 of the Provisions Relating to the Judiciary and Criminal Law and Procedures Applicable in Cambodia during the Transitional Period, commonly known as the UNTAC Law. This amendment removed the penalties of imprisonment in the event of conviction for criminal defamation but retained fines of between \$250 and \$2,500. On 7 June 2007 a new Code of Civil Procedure was passed by the National Assembly bringing definitively to a close the UNTAC transitional law.

ongoing work to modernize the peaceful assembly law and freedom of speech<sup>617</sup>, and the development of a clear policy framework on access to information to ensure full disclosure of documents of public interest<sup>618</sup> are important and effective measures to effectively address corruption in Cambodia.<sup>619</sup>

## V. THIRD POLICY ACTION: ADDRESSING THE DEFICIENCIES IN THE JUDICIAL ENVIRONMENT

### A. Policy Justification

The third policy choice would address the deficiencies in the judicial environment. The ensuing policy actions should enable the reform of the judicial environment by strengthening the integrity of the courts and empowering them to assume its rightful role in a rule-based environment. The aim would be to bring some legal convergence by achieving four closely related long-term objectives: (i) a judiciary independent from the Executive; (ii) an uncorrupted judiciary which serves as the foundation of the Rule of Law and underpins the development of a market economy; (iii) a judiciary

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See a series of newspapers articles surrounding the issue: 'NGOs praise decriminalization move', *Development Weekly* (Phnom Penh) 20 - 26 February 2006; 'Council of Ministers moves to decriminalize defamation', *Development Weekly* (Phnom Penh) 1 - 7 May 2006; 'Premier Hun Sen Criticizes UN Law on Defamation Used in Cambodia 'Since 1992'', *Agence Kampuchea Presse* (Phnom Penh) 14 August 2007.

<sup>617</sup> Pen Samithy, Club of Cambodian Journalist (CCJ) president stated that 'Successfully fighting against corruption partially relies on journalists and reporters to reveal the facts to the public.' See 'The CCJ appealed for journalists in Cambodia to assist in the Kingdom's battle against corruption', *Development Weekly* (Phnom Penh) 29 October – 4 November 2007.

<sup>618</sup> Donors have repeatedly asked for, and the Government has repeatedly promised that, such mechanisms would be established. Joint monitoring indicators agreed upon at the seventh Consultative Group Meeting for Cambodia in December 2004 included the immediate disclosure of information on concessions, including mining concessions and military development zones. The call for transparency was repeated at the Group's 8th meeting in March 2006. Donors viewed that disclosure of information on the management of land and natural resources becomes all the more important with the discovery of significant oil reserves in the Gulf of Thailand. Finally, in mid-2006, the Ministry of Agriculture, Forestry and Fisheries created an economic land concessions homepage on its website, which includes profiles of concessions granted and basic company information. In March 2007, the website was updated to reflect information current as at 31 December 2006. Information has been provided on all concessions above 1,000 hectares, including company details. See the following website <<http://www.maff.gov.kh/elc/index.html>> at 30 June 2008.

<sup>619</sup> The board of directors of the World Bank reiterated in a July 18 statement their support for Cambodian's reform efforts in good governance, pledging a USD 15 million grant through the Poverty Reduction and Growth Operations (PRGO) program. The first PRGO will provide support for the Cambodian government to implement its good governance reform program outlined in the National Strategic Development Plan (NSDP) 2006-2010. See 'World Bank reiterates need for reforms', *Development Weekly* (Phnom Penh) 23 – 29 July 2007.

readily accessible by all citizens; and (iv) a competent judiciary capable of providing professional services.

The policy actions must take into account in a holistic way the approach to the legal and justice system bearing in mind that interventions will need to focus not only on the supply side of service delivery and on the demand side interventions, but as well as on those interventions affecting the enabling environment.

Justification for these policy actions should be easily validated by the following key issues confronting the judiciary.

The judiciary is one of the main pillars of any legal system based on the rule of law. From a governance point of view, an independent judiciary is vital to a working system of "checks and balances" among government branches. If the Judiciary is susceptible to pressures from the other branches of power, the Legislature and the Executive are left unchecked, and are unlikely to be accountable to people. The public loses trust in the judiciary, creating incentives to resolve conflicts in other ways leading to the erosion of the Rule of Law. The development of a market economy will remain shallow and superficial, and the transformation from a socialist to a modern market economy will be stalled as a result.

Without a functioning judicial system economic development will suffer. The inability to enforce laws and contractual rights and obligations in a predictable, transparent and efficient fashion had the effect of undermining investor confidence and restricted the ability of the economy to expand. Respectable foreign investors are reluctant to get involved in countries without an impartial and trustworthy conflict resolution system. Serious domestic potential entrepreneurs do not want to take the risks of building businesses that can be taken away from them by an unpredictable court system, due to political influence, corruption and ignorance of economic issues. The consequence is that business suffers in volume, is conducted by less honest actors and that conflicts are solved through violence and bribery. After 30 years of war and unrest, the challenges facing the judiciary to provide a conducive business environment are enormous.

Other key issues confronting the judiciary include weak governance and corruption in the judiciary. Judges cannot be expected to be immune from corrupt influences unless they are provided with a financial package that effectively protects them from corrupt practices and material and pecuniary pressures. Undoubtedly, the benefits of such actions will be measured in the increase of confidence in Cambodia's judiciary among the public, and in particular, the private sector. Businesses will certainly take into consideration this positive development into their decision making on whether to commit new investments or at the least to retain their existing operations. As such in financial terms, the additional budget expenditures will be offset by the substantial increase of public revenues generating from the growth and success of the private sector as economic actors and taxpayers.

The judicial system capacity is not yet being addressed in any adequate way. The courts are faced with the dreaded problems of backlogs and delays and are unable to preserve comprehensive case records, nor provide parties with ready access to case documents, nor facilitate an efficient appeals process. Compounding the issue of a dysfunctional court administration system is the sheer small number of trained judges and lawyers. The statistics of the judicial staff are particularly revealing: of the 120 or so judges who are actively employed in Cambodia, barely a handful of them have any proper legal qualifications. Increasing a few dozen of legally-trained personnel to the hundreds which the administration of a country of thirteen million inhabitants would require, will take years. It will be years before the students now in law schools have the competence to be judges. It will take years until judges now sitting in the courts can be substituted by legal professionals well versed in international trade and business law.

### **B. *Building on Early Judiciary Reforms***

While some progress on the judicial reforms can be noticed in recent years, the pace was extremely slow and the process have proved to be difficult and convoluted. The

need to implement a time bound legal and judicial reform strategy and action plan is urgent, having now been on the Government's agenda for over a decade.<sup>620</sup>

Momentum seems to pick up in 2000, when the Government prepared and adopted the following year a Governance Action Plan (GAP) in which strengthening of the judiciary and law enforcement was identified as a crosscutting governance issue.<sup>621</sup> In the same year a separate Legal and Judicial Reform Council (LJRC) was constituted to carry out tasks related to judicial reform under the broad framework of the Supreme Council of State Reform, the latter was created in March 1999 and chaired by the Prime Minister. In 2004, the Legal and Judicial Reform Strategy (LJRS) and its plan of action was adopted.<sup>622</sup>

In terms of strengthening the judicial institutions, small and incremental progress was noticed. Amendments to the Law on the Organisation and Functioning of the Supreme Council of the Magistracy (SCM Law) enabled the Supreme Council of Magistracy (SCM) to function with more rigor. Besides transferring and disciplining judges, the SCM appointed some 30 new judges in 2001 all of whom had a formal legal education, and apparently without any regard to their political affiliation. The Royal School for Judges and Prosecutors and the Centre for Training Lawyers were established offering training programmes to a wide range of judicial officers and lawyers. Effective January 2002 an independent budget was allocated to the courts with a separate budget lines for the SCM and provincial courts. A modest salary increase for judges was also introduced. A pilot court project in Kandal province was initiated while another joint initiative was launched at the Ministry of Interior and the Ministry of Justice to ensure the enforcement of court decisions.

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<sup>620</sup> Way back in February 1994, the National Programme to Rehabilitate and Develop Cambodia (NPRD) set out an overall vision for the legal and judiciary reform, and an action plan to implement the program was published by the Government in February 1995. Among the many actions requiring attention were the drafting of a series of fundamental legislations including a law on the statute of judges and prosecutors, a law on the organization and functioning of courts, the civil and criminal codes, and the law on status of clerks and bailiffs. While the plan called for their adoption as early as within the subsequent three years, only the Code of Civil Procedure has been adopted as of the end of 2007. Other reform measures envisaged in 1994 and 1995 also failed to produce any concrete results.

<sup>621</sup> Council for Administrative Reform, above n 610.

<sup>622</sup> See chapter III, page 108-109.

Moving forward, the judicial reform program should be articulated along several dimensions: (i) Strengthening the judiciary as a check against arbitrary state power in both the economic realm and the area of personal freedoms, more specifically strengthening an independent court system with powers to enforce its rulings; (ii) Ensuring the functioning of an independent body charged with recruitment, career-pathing, promotion and disciplining of judges; and (iii) Ensuring even distribution of court facilities (courts and prosecutorial offices) throughout the country that are adequately staffed and equipped.

## 1. *Institutional Reform*

Strengthening the judiciary as a check against arbitrary state power will require a comprehensive approach to tackle corruption as the main cross cutting issue as well as lack of independence and politicisation. A key institution like the SCM should be subject to further reform. Fundamentally, it needs to be independent and non-partisan in nature and membership on the one hand, and on the other it needs to act in a competent and credible manner.<sup>623</sup> Previous amendments of the SCM Law was a step in the right direction but the changes went only as far as creating a more autonomous and effective secretariat of the SCM which was entrusted with increased responsibility and functions. These amendments are, however, unlikely to bring about the transformation in the quality of the Cambodian judiciary in the absence of real structural reform.

The new reform measures must be more far reaching: they have to tackle changes in the composition of the SCM to make it broadly representative, free from executive influence and transparent in its operation; they have to empower the SCM with increased jurisdiction to ensure the independence of the judiciary through the establishment of a fair, autonomous and strong judicial service system; and last they have to propose measures to define the functions and procedures of the disciplinary committee to render them effective.

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<sup>623</sup> The SCM is supposed to be an independent organ of the judicial branch of the state. Among its nine members, however, is the Minister of Justice, a member of the executive branch, and others with strong political ties to the ruling party.



(a) *Discipline:* Reinforcing discipline is another way to strengthen – or to tackle the corrupt practices - of the judiciary. Amendments should reaffirm the independence of the SCM and vest it with the powers that it needs to enforce discipline in the judiciary and, in so doing, discharge its constitutional mandate. The issue of conflicts of interest should be one of the prime criteria justifying the amendments. As such the amendments should provide for the removal of any members who currently hold posts in either the Executive or Legislative branches. Members of the SCM should not be sitting judges on any court as they constitute a violation of the Constitution's separation of powers requirements.

(b) *Appointments and Promotions:* In the absence of a law governing the appointments and promotions of judges, the criteria for their selection have been unclear. The adoption of a Law on the Statute of Magistrates is urgently needed to establish among others: a judicial service tenure system which defines the role of judges and determines the criteria and process for their appointments and promotions; service conditions and benefits; ethical principles and codes of conduct; and a defined salary structure.

(c) *Judges' salaries:* The issue of salaries cannot be dissociated from the other issues facing the judiciary. The low salaries of judges are certainly not the only factor, or even the chief factor, driving the alleged corruption in the judiciary, but it is bound to be a factor. Providing them with a salary that covers a reasonable living conditions on the one hand will decrease the risk associated with corrupt practices and on the other hand give them a sense of dignity and professional pride.<sup>624</sup>

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<sup>624</sup> Buscaglia and Ratliff argue that institutional inertia in enacting reforms stems from the long-term nature of the benefits of reform-such as enhanced job opportunities and professional prestige-in the reformers' minds. These benefits cannot be directly captured in the short term by potential reformers within the government. The long-term benefits can hardly compete with such short-term losses as the anticipated decrease in the state officials' access to explicit payoffs and other informal inducements. This contrast between short-term costs and long-term benefits has often blocked judicial reforms and explains why court reforms, which eventually would benefit most segments of society, are often resisted and delayed by those currently in power. Thus reform sequencing must ensure that short-term benefits for the public officers responsible for implementing the changes somehow compensate for the certain loss of rents. In turn, reform proposals generating longer term benefits to the members of the court systems need to be implemented in the later stages of the reform process. See Edgardo Buscaglia and William Ratliff, above n 19, 5.

## 2. *Court Organization*

(a) *Legal and institutional framework:* The work would entail the organization of the Judiciary into a hierarchy of specialized tribunals and the establishment of ways and means for the Judiciary to regulate itself. Development of a hierarchical structure of courts would ensure both the consistency of verdicts and practice as well as ensure a clear route of appeal (e.g. existence of established procedural codes for the courts). A draft law governing the organization of the courts has been prepared. It is expected that the new law, when adopted, will address some of the weaknesses which have been identified in the court system, particularly in terms of specialization and specialized courts. A model court established in Kandal province to develop best practices in processing cases is a good start.

Another tangible experiment worth noting in the reform process is the joint preparation by the Ministry of Commerce and the Ministry of Justice in the development of a specialized commercial court.<sup>625</sup> The commercial court model could provide momentum for judicial reform and the subsequent establishment of other specialized courts like the Labour Court and the Administrative Court.<sup>626</sup>

(b) *Judgment execution.* It is obvious that the work of the courts — regardless of its quality — will be largely meaningless if the parties cannot rely on effective enforcement of judgements and decisions. Cambodia lacks a functioning enforcement mechanism. Like many elements of the Cambodian legal system, the ultimate answer depends more on politics and personal influence than on law, i.e. under the right conditions, with the right people involved, the system can work effectively. The problem is that parties cannot anticipate with any certainty the outcome of a case. The

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<sup>625</sup> See Canada International Development Agency (CIDA), *MoU Between the Government of Canada and the Royal Government of Cambodia concerning provision of technical assistance for the drafting of laws and/on procedures pertaining to the Establishment of a Commercial Court and Commercial Arbitral Center* (2002).

<sup>626</sup> According to the current draft, the proposed commercial court would be vested with jurisdiction to hear disputes in a broad range of commercial areas, including: business, banking and finance, insolvency, intellectual property, trade and competition, both of a civil or criminal nature. It would also have exclusive jurisdiction over the recognition and enforcement of foreign court orders, and foreign arbitral awards. The operations of the commercial court would be governed by its own rules of procedures, supplemented by the civil procedure and criminal procedure codes. Only persons who have completed a specialized education program for commercial court judges would be eligible for appointment.

Law on Enforcement of Civil Judgments<sup>627</sup> provides for the attachment of assets to satisfy judgments, but in practice it is very difficult to enforce a judgment if the force of persuasion does not work. Also it is virtually impossible to enforce a judgment against a politically powerful person.

Enforcement falls formally under the responsibility of the prosecutors. However, due to excessive workload and lack of resources, enforcement is not prioritised. Another contributing factor is the lack of cooperation with the police. The judicial reform work needs to include a reform of the mechanism for enforcement. An essential priority for an efficient judiciary is, thus, the enforcement of judicial decisions. This enforcement capacity can be supported through the design and application of appropriate court management tools, the formulation and adoption of enforcement procedures and the training of civil enforcement personnel, including judges and bailiffs.

### **3. *Physical Infrastructure***

The object is to prepare a comprehensive strategy and investment plan to rehabilitate tribunals and equip them so as to improve the effectiveness of the Judiciary. The building of the Municipal Court of Phnom Penh and those of other lower provincial and municipal courts should be rehabilitated and expanded to accommodate new office space to house judges and their staff. Judges should be equipped with adequate hardware and software required to perform their mandated tasks. Over time, in the drive towards greater efficiency, the courts should consider employing information technology, i.e. computerized case management systems as tools in the adjudication process. Regional Appellate Courts should be established in key provincial towns to ease access and reduce the costs for people in outlying regions. The initiative of the Ministries of the Interior and Justice to establish justice service centers in rural areas to bring justice closer to the poor is a good start.<sup>628</sup>

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<sup>627</sup> *Law on Enforcement of Civil Judgments 1992.*

<sup>628</sup> See 'Justice for all, new minister says', *Development Weekly* (Phnom Penh) 16 – 22 August 2004. The new Justice minister stated that his goal will be to "give access to justice to all", by sending judges and lawyers to the field to advise people and explain the laws and procedures; See also 'Ministries, UNDP set up local legal service centers', *Development Weekly* (Phnom Penh) 30 July – 5 August 2007. According to the article, the centers' main functions are to provide technical assistance to out-of-court compromise mechanism at commune level through training and

(a) *Court Administration:* In order for the judiciary to improve public confidence, it must also address court administration. The lack of capacity in the training of judges and clerks has a bearing on the management of courts. A priority area is the effective management of caseloads in civil cases. So far, no standards have been developed to ensure the efficient resolution of civil cases, nor a definition of the respective role of each judicial actor in the management of individual cases. This is a fundamentally new area where innovative practices could be supported and tested in courts under a pilot program. Case management tools, if available, could lay the basis for an increase in productivity and efficiency of judicial work. It is suggested that a scheme be set up involving some representative model courts which would design and apply such basic judicial tools. The lessons learned from this experience could then be rolled-out to all courts.<sup>629</sup>

(b) *Access to court decisions:* Among other important measures that would help to improve governance in the judiciary is ensuring that all laws are published on a timely basis and made available to the general public. The object is to promote a good understanding of the laws, regulations, procedures and decisions of the courts. Case decisions by courts cannot currently function as a source of law. Cambodian courts do not publish decisions. In fact, Cambodian courts do not always file or record decisions. Court decisions are often communicated to the parties only in the form of a court order, without reasoning or explanation. When there is a written decision, it is often quite brief - just a short description of the facts of the case, a citation to the relevant statutes, and a verdict. Decisions are usually not made available to anyone other than the parties to the case, and they are not consistently recorded at the court itself. Court decisions - even Supreme Court decisions - are rarely publicized. Records of past decisions are not considered public information.

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consulting, and to provide legal consultation to disputing parties who do not want a compromise at commune level by pointing them to lawyers services and court procedures before they enter the courts.

<sup>629</sup> Buscaglia and Ratliff argue that low court productivity may also be due to court personnel lacking (1) a clear conception of the courts' mission (i.e., resolution of conflicts); (2) efficient organizational strategies to accomplish their mission (e.g., knowing the optimal case management style for a judge); (3) methods of evaluation, such as quantifiable measures of how well the court has accomplished its mission; and (4) quality control techniques applied to procedural times. Any organization, private or public, must incorporate these four factors into the activities of its administrative and jurisdictional personnel if it wishes to experience a high level of productivity and user satisfaction. See Edgardo Buscaglia and William Ratliff, above n 19, 5.

Initiatives could include the publications of verdicts, decisions and rulings, or digests of all levels. The existing Bulletin of Supreme Court Judgments should be regularly published. Similar efforts at the Court of Appeals and the municipal courts should be undertaken. The decision of the Chief Justice of the Supreme Court to commit to publishing judicial decisions to improve transparency of the judicial process and building a body of Cambodian jurisprudence is a progress worth noticing. At the end these publications will serve to enhance transparency and effectiveness of the court and can serve as seedbeds for the buildings of the Cambodian jurisprudence. For the benefit of foreign investors, court decisions that specifically pertain to commercial matters must be catalogued, translated, placed on-line, and must be continuously updated.

(c) *Capacity building for judges and court support staff:* The success of any court depends very much on the competence of the judges and the quality and management of its administrative and support staff. Enhancing judicial productivity through the improvement of work processes require the constant skills upgrading of both the judges and his team of judicial and administrative officers. Whether it is the training of judges and court officers in substantive or procedural rules, or even the training of lawyers and paralegal staff, the need for training cannot be overemphasized.<sup>630</sup> Raising the level of human resources in the judiciary is a long-term process for the reason that many areas of law are highly technical and difficult to master, even for trained lawyers.

Judicial officers will require intensive, comprehensive training to, not only strengthen their basic legal skills in legal reasoning, drafting, and research, but also to address substantive areas of law, for example, related to complex commercial transactions. Their training should not just be limited to legal topics. All year-round professional training should be provided in the form of in-house education workshops as well as overseas courses and seminars in order to expose them to current or other real world

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<sup>630</sup> The following anecdote is revealing on the extent of the crisis. More than 40 Appeals Court clerks have appealed to Prime Minister Hun Sen to abandon a requirement that all court clerks must pass an exam or lose their positions. The Council of Ministers issued a notice ordering 765 clerks, including 64 Appeals Court clerks, across the country to undertake three-month training courses followed by an exam. The Appeals Court's chief clerk said that five out of the six clerks who attended the training failed their final exam at the Royal Academy for Court Professionals, causing them to be dismissed from their positions. See 'Court clerks upset as exams threaten job security', *Development Weekly* (Phnom Penh) 15 - 21 May 2006.

events taking place around them.<sup>631</sup> This type of retraining provided through continuing legal education programs is essential to guarantee the very credibility of the judiciary.<sup>632</sup> Judicial officers should be provided with adequate access to laws of the country and to the body of international law and professional literature.

Given the current levels of education among judges and prosecutors, major, long-term legal training is needed in order to improve the performance of the Judiciary. The creation of the Royal School of Magistracy – which has already trained two promotions of judges - and the opening of the Royal Academy for Judicial Professions have laid the foundations of this structure. The recruitment of new judges, with formal legal education, must be part of the solution.

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<sup>631</sup> The greatest exposure for the judiciary is the ongoing trials of senior officials of the Khmer Rouge regime for atrocity crimes. The Cambodia Tribunal Monitor, available at <<http://www.CambodiaTribunal.org>>, currently serves as a leading source of news and information on the trial. Throughout the court proceedings, the Web site offer news updates, video excerpts of the trials and guest commentaries by leading international experts on the recent history of Cambodia, politics, human rights and international law. Important resources such as court documents and bibliographies of scholarly articles and books are also posted.

<sup>632</sup> See 'Judges and prosecutors learn intellectual property law', *Development Weekly* (Phnom Penh) 16 - 22 January 2006. More than 20 judges and prosecutors attended a workshop to learn how to solve increasing disputes on intellectual property rights in developing countries like Cambodia.

## **CHAPTER X:**

### **INTENDED OUTCOMES**

## Chapter X:

### Intended Outcomes

#### I. SITUATIONAL CONTEXT

Seventeen years ago the visionaries of the Paris Peace Accords opened the door for Cambodia to exit from conflict and re-enter peacefully the region and the world. Since then, the architects and implementers of these accords, while not underestimating the post war and conflict difficulties, strive to rebuild Cambodia. The achievement of peace, stability and growth in Cambodia in recent years has been truly remarkable given the country's tragic history.

Cambodia is at peace and that can not be emphasized enough. After decades of conflict, it is perhaps the greatest blessing to flow from the Paris Accords. Peace reigning today throughout the nation is critical to each of the following points:

- Cambodia has held three national elections, one Commune Council Election and more are scheduled in 2008. Observers have considered each election freer and fairer than the previous one. While these elections were not perfect, they have given the large number of citizens who have voted the chance to exercise their democratic right of selecting their leaders.<sup>633</sup>
- There has also been improvement in the non-governmental organization sector,<sup>634</sup> leading to a significant development in the voice of many elements of society.<sup>635</sup> The peaceful settling of political differences has also greatly contributed to this development. The coronation of HRH King Norodom

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<sup>633</sup> Peou argues that '[O]bviously Cambodia was hardly a country that could be transformed into a democracy overnight, given its centuries-old undemocratic leadership culture and poor socio-economic conditions. The anti-democratic cultural factors have obviously hindered attempts by democracy promoters to accomplish their mission, but culture is dynamic and subject to change'. See Sorpong Peou, above n 39, 259.

<sup>634</sup> 'Cambodia laden with NGOs', *Development Weekly* (Phnom Penh), 23– 29 August 2004. According to the article nearly 1,500 NGOs and associations have been registered in Cambodia in the past 10 years.

<sup>635</sup> Reporters Without Borders, *Press Freedom Index* (2007). Cambodia ranks 109<sup>th</sup> in press freedom out of 169 countries. <[http://www.rsf.org/article.php3?id\\_article=11715](http://www.rsf.org/article.php3?id_article=11715)> at 30 June 2008.



Sihamoni in October 2004 is further testament to the growing stability of the nation. The smooth transition of the Monarchy has provided a fresh voice to promote values, moral authority and national traditions.<sup>636</sup>

- Cambodia has moved from the isolation of the 1980's to integration into ASEAN, WTO and other regional and international organizations.
- Cambodia has done well economically, with double-digit growth for the past three years, a sharp increase in tourism and reductions in overall poverty levels.
- International textile companies are investing in Cambodia due in large part to good labor standards. The government's policy decision concerning good labor practices within the garment industry has been an important factor in creating nearly a third of a million jobs. Cambodia has thus crafted a special comparative advantage by setting high labour standards and in so doing developing a niche within the industry.
- The recent discovery of oil and gas will bring a new large funding source for Cambodia's development that is totally outside of the Official Development Assistance (ODA). The new revenues over the coming three to five years will move Cambodia into a new era of prosperity – that the blessings of this natural resource will be realized, not the curse.
- Investments in health and HIV/AIDS, coupled with coordinated efforts of Government and development partners including NGO's are paying off. Over the past five years adult prevalence of HIV has fallen have fallen as much as infant and child mortality rates.
- The long awaited Extraordinary Chambers of the Courts of Cambodia (ECCC) that will investigate and bring to trial those responsible for crimes during the

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<sup>636</sup> In a Survey of Cambodian Public Opinion done by the IRI during the period 20 December 2006 – 20 January 2007 face-to-face interviews were conducted in all 24 provinces. When asked whether they feel the country is going in the right direction 71% replied yes. See International Republican Institute (IRI), *Survey of Cambodian Public Opinion*, above n 452.

Khmer Rouge period has begun its work.

However, there remains a multitude of unmet commitments under the Paris Peace Accords.<sup>637</sup> Implementation of international human rights treaties to which Cambodia is party has been slow.<sup>638</sup> In the administration of justice, issues of neutrality and independence, impunity, access to justice and legal aid for the poor are still a concern. Access to information held by public authorities remains extremely limited, including access to laws and executive regulations.

Considering that the United Nations has invested heavily in Cambodia in the early 1990s to restore normalcy to a 20 years old war-torn country and to put in place a constitutionally elected government, there was an expectation that Cambodia would be able to develop and lift its people out of the fear and poverty in which most had lived for decades. The progress realized has been fast and profound, yet there is much more to be done. Now Cambodia faces the challenge of moving to the next level of development. The next fifteen to twenty years can ground that work and lead to a long term, sustainable success.

Thus the overarching expected hard outcomes over the next two decades would be at the least: (1) the realization of the fundamental values/principles in the Paris Peace Accords and those as set out in the 1993 Constitution. This set of fundamental constitutional values — (i) Liberal democracy and the Rule of Law, and (ii) The rights of the individual — will guide the development and reform of the State; (2) the second main outcome would reflect the attainment of the overall objectives of securing a sustainable long-term economic growth and development as well as an

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<sup>637</sup> The Paris Peace Accords gave the Commission on Human Rights a continuing mandate to monitor the human rights situation after the end of the transitional period, including by the appointment of a Special Rapporteur. Since 1993, the UN Secretary-General has appointed four special representatives for human rights in Cambodia, whom he has successively entrusted with maintaining contact with the Government and the people, and assisting the Government in the promotion and protection of human rights.

<sup>638</sup> Compare the 1994 and 2004 Resolutions of the General Assembly wherein the General Assembly, in their resolutions on Cambodia supported and encouraged the Government to strengthen its efforts to further the observance of human rights and the rule of law. *Resolution adopted by the General Assembly: Situation of human rights in Cambodia*, GA Res, 3rd Comm, 48th sess, A/RES/48/154 (1994) ; *Resolution adopted by the General Assembly : Situation of human rights in Cambodia*, GA Res, 3rd Comm, 48th sess, A/58/508/Add.2 (2004) ; See also a recent report of the Human Rights Council, *Implementation of General Assembly Resolution 60/251 of 15 March 2006*, above n 432.

alleviation of poverty; and (3) a softer though more encompassing outcome would be the overcoming of perception.

## **II. FIRST OUTCOME**

### **A. *Realization of Fundamental Constitutional Values***

The achievement of fundamental constitutional values would have two effects: On the one hand it would push for further legal convergence in areas where legal convergence already exists, and on the other hand it would narrow the gap in those areas where legal divergence is still predominant.

#### **1. *A Liberal Democracy and the Rule of Law***

When Cambodia is recognized as a State respecting the Rule of Law, six distinct occurrences within the society should be visible: (a) no one should be above the law, whatever their position or social standing, and everyone should be equal before it; (b) all public officials should be subject to the law, and act within the terms of legally prescribed duties, powers and procedures; (c) Parliamentary law-making should itself conform to constitutionally defined procedures and limits; (d) the judiciary should be institutionally and personally independent of both the executive and legislature, so that it can interpret and enforce the law without fear or favor; (e) all law should be certain, and its provisions and penalties known in advance; and (f) no one should be punished without a specific charge and a fair hearing before a duly-constituted court. These ideas form the cornerstone of a democratic government.

A liberal democratic Cambodia implies that its political system is able to draft and pass adequate and relevant laws, to enforce them, and to uphold them effectively whether in the relations between the citizens or between the citizens and the state. As such, the rule of law ensures that the relations between the state bodies and the citizens are predictable and transparent, thus creating a stable and secure environment for the citizens to freely engage in all aspects of economic and social activity on which the aggregate wealth of the country depends. The creation of such environment would provide flexibility for market agents and stable institutions to enforce contracts

and property rights and enhance the predictability, transparency and accountability of state actions. Concretely, the adequacy of laws and their effective enforcement encourage and promote trade and investment, reduce transaction costs and risk, deter corruption and generally enable the private sector to mobilize human, physical, financial, and technical resources to make profits and accumulate wealth.

A liberal democratic Cambodia also presupposes that a basic measure of trust exists between the citizens and the state premised on the expectation that the state acts from a principle of fairness and justice. In this situation the individuals feels confident that their basic interests are protected. Thus, it enables them to act with confidence and take responsibilities at all levels of economic and political life. In the context of the rule of law, the state does not restrict the freedoms of its citizens, nor accord favors to certain groups except by law.

Concretely, there would be a shift away from the current business system based on close business-government relations and reliance on structures bound by interpersonal trust, based on kinship, personal, ethnic, military and commercial backgrounds. The existing type of vertical relationships between economic actors and the state would fade away in favor of a more horizontal relationships. For a time, these personal ties were an adequate substitute for providing security for economic transactions but they are not likely to serve the country as well in the future. *First* the rules of the international economic system have changed, as manifested in such institutions as the WTO. As a small economy without a critical market mass, Cambodia wants and needs access to the markets of Europe and North America. Fairly or not, that access will require Cambodia to strengthen the degree to which its economic system is governed by transparent laws instead of opaque discretionary actions by government officials. *Second*, a modern economy requires well-functioning formal (or governmental) institutions. When Cambodia can develop and strengthen such formal institutions, the country will grow.

Another specific visible outcome would be the strengthening of governance. Corruption is a key symptom of weak governance and studies show that it is widespread in Cambodian society. Corruption demoralizes democratic aspirations, damages the trust and confidence of the people for their leaders, inhibits investment,

impedes economic growth and development, and threatens institutions, fundamental rights and freedoms. It also threatens international support for the country, which amounts annually to over \$500 million. Improving governance in the administration of new found oil and gas revenues which could well exceed \$2 billion per year would serve to consolidate further the country stability and serve as a springboard to a better future.

In sum, with stronger and wider areas of legal convergence occurring over time we would witness the presence of adequate legal institutions providing a framework for the state to provide credible commitments to market-enhancing property rights and supporting the foundation for a market economy. Legal convergence would also suggest a legal environment with fewer inconsistencies in legislation, increased transparency in legislative processes, stronger capacity to draft and implement laws, and improved participation of stakeholders. Ideally, the legal environment will stimulate the Weberian notion of calculability and predictability as characterized by a law-making process capable of integrating business oriented laws within the prevailing legal system and minimizing regulatory intervention, and by legal institutions capable of implementing those laws in an efficient and transparent manner.

## **2. *The Rights of the Individual***

The freedoms and rights of the individual are already enshrined in the Constitution and in the principles of international law adhered to by the Cambodian state.<sup>639</sup> The upholding of the rights of the individual is perceived as essential in enabling the Cambodian citizens to act as agents of their economic, social, cultural and religious interests and to inspire in them the ability and confidence to use the opportunities available to them. The intended outcome would be to see the clear protection and observance of these rights as an intrinsic part of promoting a free market economy by

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<sup>639</sup> Noting that Cambodia's "tragic recent history requires special measures to ensure protection of human rights", the Paris Peace Accords set out in detail the human rights provisions to be included in the new Constitution, which should contain a declaration of fundamental rights. These rights should be enforced by an independent judiciary, and "aggrieved individuals" should be able to enforce their rights before the courts. Adherence to international human rights instruments was also a core part of the agreements.

the Cambodian State in all matters of lawmaking, in the use of executive authority and powers, and in the rendering of justice by courts of law.

Because the Rule of Law presupposes that the citizens are made aware of the laws in an effective manner, and that they have access to justice to protect their interests, then the intended outcome would be to see the Cambodian Government promoting access to information, including the ability to understand the information, in order to raise awareness, to increase the accumulation of knowledge and skills, to enable individuals to act in their own best interest, to promote fair competition in the marketplace and to enable the citizens - if necessary - to challenge the actions of government.

An effective access to justice would cover all aspects of administrative, criminal and civil matters, including a system of alternative dispute resolutions. All institutions of the justice sector would enjoy the confidence and respect of its citizens and they are held to highest standards of professionalism, ethics and accountability. Without a functioning judicial system economic development will suffer. Respectable foreign investors are reluctant to get involved in the country without an impartial and trustworthy conflict resolution system. Serious domestic potential entrepreneurs do not want to take the risks of building businesses that can be taken away from them by an unpredictable court system, due to political influence and corruption. The consequence is that business suffers in volume, is conducted by less honest actors and that conflicts are solved through bribery and at times through violence.

## **II. SECOND OUTCOME**

### **A. *Securing New Sources of Growth***

Assuming the ideal scenario where the bulk of the policy actions are implemented, Cambodia will be able to secure and develop new sources of growth and to attract new foreign investment to develop them, and to gain confidence from the national and international communities. Thus the second main outcome would reflect the attainment of the overall objectives of securing a sustainable long-term economic growth and development as well as alleviating poverty.

The realization of this specific yet broad outcome would be complete when Cambodia could unleash the potential and resources deriving from foreign direct investment and from private local investment. Private sector development does not thrive in a vacuum. In fact it happens only when a host of other factors are present — i.e. a political and social stability, a stable and predictable investment climate that comes from macro-economic stability, a transparent and accountable government, a rigorous enforcement of the rule of law, functioning markets and institutions, a skilled and productive labour force, a strong commitment to fighting bribe solicitation and corruption, an affordable and accessible infrastructure, and intellectual property right protection. Ultimately, Cambodia would need to constantly attract foreign direct investment, not only for the extra capital it brings, but for a myriad of other reasons like technology transfers, the formation of better human capital, a deeper international trade integration, and a more competitive business environment.

# ***1. Mobilising Private Investment to Enable Broad-based and Sustainable Growth***

Cambodia has many positive attributes and economic opportunities that could contribute to rapid and sustainable development provided it could turn this enormous potential into a good context to undertake concrete reforms focused on enabling broad-based growth:

(a) *Garments sector.* The sector has grown phenomenally due to preferential access and particularly to good labor practices. Building on the success of the implementation of a textiles agreement it entered in 1999 with the US, Cambodia has carved its competitive niche in a post-MFA environment without benefit of quota allocation by positioning itself as a country that protects core labor standards. This success contained lessons about the important role of adhering to internationally acceptable standards in building confidence with foreign buyers and investors. These lessons can be applied more broadly. They can be put into action so that not only the garment sector thrives, but other sectors do as well, and Cambodia can develop an international brand for socially responsible production, resource development and

tourism. That reputation would help Cambodia to sustain high growth and overcome poverty in the face of tough global competition.<sup>640</sup>

(b) *Tourism.* Cambodia is blessed to have one of the Seven Wonders of the ancient world that continues to attract visitors from around the world. New potential in cultural and eco-tourism, as well as backward linkages to handicrafts and arts, have yet to be tapped. The development of a sustainable tourism industry that will effectively incorporate linkages to the agriculture sector and the preservation of Cambodia's tourist assets, while challenging for the industry and the Government, remains a source of high value-added and value retention for the rural communities.

(c) *Agro-industry.* The agro-industrial sector arguably has the highest potential for creating broad-based employment. Half of the arable land is underutilized, and 80 percent of the population lives in the provinces with the majority involved in the agrarian sector. The challenges lie in the ability of the government and its private sector to add and retain value of its agricultural outputs, which is substantial, particularly in rice, commercial crops and seafood.

(d) *Extractives.* International firms have discovered quantities of off-shore oil and gas reserves that are commercially viable. Mining minerals in the North East of Cambodia has begun and recent interest has been shown in exploring the potential of oil deposits close to the Tonle Sap lake. Private sector investors might be induced to undertake investments in downstream industries including pipelines, oil refineries, fertilizer plants and power plants. The lack of a transparent legal and regulatory structure for managing the concessions remains a constraint and needs to be removed.

(e) *Services.* The pace of urbanization has increased, creating an increasingly viable urban market with gradually increasing purchasing power. This has led to rapid growth of retail trade, new modern commercial banking, housing market and a multitude of supporting services, though they remain still in its infancy. There are great potentials to attract foreign investors who would bring productivity-enhancing

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<sup>640</sup> See the full report of FIAS (Foreign Investment Advisory Service), Cambodia: Corporate Social Responsibility in the Apparel Sector and Potential Implications for Other Industry Sectors (2005).



technology and practices if they could be persuaded of a better and more predictable investment climate.

(f) *Infrastructure and construction.* Cambodia's infrastructure indicators per capita remains the lowest in the region. There is substantial potential to increase both public and private investment, bearing in mind a track record of successes in private participation in mobile telecommunications, airports, and utilities sectors. The challenges remain in improving the discretionary regulatory environment and providing transparency in infrastructure deals.

Developing these economic opportunities in order to secure an equitable and inclusive growth would require Cambodia to invest heavily from its public coffer, a challenge Cambodia could hardly respond due to its limited financial resources as a Least Developed Country (LDC). The intended outcome thus would be the commitment of the Government to provide an environment more conducive to attract private sector participation. Market risks associated with private investments in downstream oil and gas industries and other large infrastructure should remain with the private sector. Leaving the investments and the investment decisions to the private sector will ensure that development of the sector will be efficient and responsive to market demand. Infrastructure facilities undertaken by the private sector could offer services at lower unit costs, with faster implementation, better risk allocation, and better incentives to perform. It also means leveraging, where possible, the role of the private sector in influencing the establishment of appropriate governing institutions, as well as market-based accountability mechanisms.

### **III. THIRD OUTCOME**

#### **A. *Overcoming Perceptions***

Last is the challenge of overcoming perceptions. This soft and hard-to-measure outcome is encompassing. Over the decade, Cambodia has never broken the frequent impression of both foreign and domestic investors that corruption is not only tolerated but a basic way of doing business. It neither has firmly established confidence among

domestic and foreign investors that the political risk and uncertainty are things of the past nor has it truly cleared the perception that its growth is inclusive and sustainable.

Important commitments and delivery have been made to Cambodia by the international community since the early 1990s. More fundamentally for their part, the Government, the ruling party, other political parties and Cambodia's powerful business elites would do well to reflect on the kind of society they want Cambodia to become. It is thus their duties and responsibilities to implement the policies and laws they have committed and to show progress, incremental as it may be, over a period of time, in particular in these few key areas of concern.

### **1. *Corruption is a thing of the past***

In the past, the government has made strong statements about combating corruption. Yet despite this positive rhetoric, the perception remains that there is a manifest lack of political will to tackle the problem. The enactment and implementation of an anti-corruption law, a strong willingness to investigate or prosecute corruption, a systematic application of external auditing of state finances, and the disclosure of assets by public officials are all good opportunities to create a more transparent and accountable public sector. As Cambodia looks to the future, the Government coming to grips with corruption will be perceived as a positive motor for progress, investment, jobs and dignity. In short, establishing anti-corruption systems and enrolling people and institutions behind, will bring powerful benefits for a nation and its people. It is a key ingredient in moving a country from extractive practices to real nation building.

### **2. *Establishing confidence among investors***

Weak and unpredictable enforcement of the existing laws, contracts and court decisions, inconsistent interpretation of laws and regulations, deficiencies in the public procurement regime and the lack of accountability of the government all contribute to a poor image of Cambodia in the eyes of the international business and development communities.

The Legal and Judicial Reform Strategy is an impressive document that carefully documents deficiencies in the legal system and lays out a prioritized strategy for reform.<sup>641</sup> Implementing the strategy would reduce the high degree of cynicism, which currently overshadows the reform effort. Appointing men and women of outstanding integrity and capability with no potential conflicts of interest, committing significant resources, along with political will and inculcating a culture of legal formality where processes rather than people matter most are all necessary for marked improvement in court administration and independence.

### 3. *Moving toward inclusive and sustainable growth*

Cambodia has enjoyed rapid economic growth and a reduction in overall levels of poverty in the past decade, but the benefits of this growth have not been shared equitably among its citizens.<sup>642</sup> Disparities in income and access to opportunities have increased, particularly in rural areas. Rural communities are heavily dependent on land and forest resources, and landlessness has been cited as a main cause of widespread poverty in rural Cambodia.<sup>643</sup> As evidence from Cambodia's recent history and elsewhere indicates, repression, intimidation and extortion can create preconditions for serious counter violence. Prime Minister Hun Sen has himself recognized this, for example, in his statements on land grabbing.<sup>644</sup> Peter Leuprecht, Special Representative of the UN Secretary General for Human Rights has aptly stated that '[f]or all societies, it is extremely dangerous to have more and more people who have nothing to lose'.<sup>645</sup>

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<sup>641</sup> Royal Government of Cambodia (RGC), *Legal and Judicial Reform Strategy* (2003).

<sup>642</sup> World Bank Country Manager Nisha Agrawal, 'Opening Remarks at the Launch of the Cambodia Equity Report 2007: Sharing Growth' (Speech at the Joint Royal Government of Cambodia and World Bank Conference, Phnom Penh, 12 June, 2007).

<sup>643</sup> According to the World Bank Development Report, over the last decade the poorest twenty percent of Cambodians have seen their living standards increase by 8 percent. During the last 10 years the richest 20 percent have seen their living standards rise by 45 percent. *Development Weekly* (Phnom Penh) 19 – 25 June 2006.

<sup>644</sup> Prime Minister Hun Sen warned that the gap between the urban rich and rural poor could have dangerous consequences, arguing that class tensions enabled the Khmer Rouge to kill millions of people under the leadership of Pol Pot. See 'PM: Khmer Rouge driven by class gaps, government must act to avoid possible social unrest', *Development Weekly* (Phnom Penh) 25 – 31 July 2005.

<sup>645</sup> Cambodge Soir, Interview with Peter Leuprecht, Special Representative of the UN Secretary General for Human Rights (Phnom Penh, 13 November 2004).

The challenge that lies ahead for Cambodia, working with its development partners, is to develop and implement policies and practices that promote equitable and shared growth in Cambodia, and the management of common resources for the benefit of all Cambodians. UNDP Assistant Administrator and Director for Asia Pacific Hafiz A. Pasha stressed that “[C]ambodia has increased its economic growth and now we have to use the growth to narrow inequality”.<sup>646</sup>

Fortunately, most of the necessary policies and legal framework are now in place and could be implemented more vigorously, among others: accelerating the systematic land titling would improve the tenure security; enforcing the Economic Land Concessions (ELCs) Sub-decree would ensure that ELCs are actually being used for investments, growth and job creation rather than being held idle for speculation; and implementing the Social Land Concessions (SLCs) Sub-decree would improve access to land for poor landless households. In the area of oil and gas and other natural resources management, adhering to the Extractive Industries Transparency Initiative (EITI)<sup>647</sup> would be a good start for the common good of all Cambodians.

In conclusion, Cambodia can solemnly assert that —15 years after the Paris Peace Accords and 3 decades after the end of the regime of Democratic Kampuchea — it has delivered its commitments and ensure a legacy of peace with justice and prosperity for all Cambodians concerned.<sup>648</sup>

As Robert Zoellick, President of the World Bank, puts it:

Cambodia is at a pivotal moment in its recent history, facing key choices as it marks its first decade of peace and stability after many years of shattering conflict and suffering. Cambodia has the opportunity to build on its recent strong economic performance to

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<sup>646</sup> Cambodge Soir, Interview with UNDP Assistant Administrator and Director for Asia Pacific Hafiz A. Pasha (Phnom Penh, 10 July 2006).

<sup>647</sup> The EITI sets a global standard for companies to publish what they pay and for governments to disclose what they receive. For more on the EITI see <http://eitransparency.org/eiti> at 30 June 2008.

<sup>648</sup> The Declaration on the Rehabilitation and Reconstruction of Cambodia, which was part of the Paris Peace Accords, provided that the primary objective of the reconstruction of Cambodia should be “the advancement of the Cambodian nation and people, without discrimination or prejudice, and with full respect for human rights and fundamental freedom for all”. It also provided that economic aid should benefit all areas of Cambodia, especially the more disadvantaged, and reach all levels of society. The peace agreements recognized the centrality of human rights in promoting equitable and sustainable development in Cambodia.

broaden and deepen the foundation for sustainable economic growth. The World Bank wants to assist the Government to enact reforms to reduce rural poverty, encourage social development, improve the business and investment climate, and strengthen the rule of law. These next, essential steps would help the Government earn the respect of entrepreneurs and investors and, more importantly, the appreciation of Cambodians, who have suffered much and seek the full benefits of peace, growth and opportunity.<sup>649</sup>

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<sup>649</sup> World Bank, 'Cambodia Facing Key Choices to Build Domestic Opportunity, Manage International Challenges: World Bank President' (Press Release, Phnom Penh, 5 August 2007).

## **CHAPTER XI:**

## **CONCLUSIONS**

## **Chapter XI:**

### **Conclusions**

#### **I. SUMMARY OF THE CAMBODIAN EXPERIENCES**

##### **A. *Economic Convergence, Divergence and Differentiation***

##### **1. *Economic Convergence***

After decades of war and authoritarian government Cambodia is in many ways still a post-conflict society and political system. The three-fold transition that began in the late 1980s—from civil war to peace, from one-party rule to multi-party democracy, and from economic isolation to integration—has given rise to complex and often negative forms of governance structure. The causal links were not restricted to the interaction between law, economic development and economic policy. The strength and direction of that interaction is determined by another variable - politics. While policies became the key determinants for changes in the nature of legal system between 1954 and the present, it was largely politics which have undermined its implementation.

Confirming the economic convergence hypothesis, certain Cambodia experiences – policies – have shown substantive convergence with those of the West or other advanced Asian countries as reflected by the steady economic growth over the past decade. Along that line the degree of catch-up is not only feasible but far exceeds those of other similar countries. Garment exports have held up after the end of quotas, tourism is booming, and significant oil exports are a real possibility. Cambodia is benefiting geopolitically from a growing, stable, and integrating East Asian region, macroeconomic stability, and new market opportunities afforded by the economic boom of China. In recent years, Cambodia has used its place at the heart of South-East Asia to engage the various mechanisms of free trade for the purpose of building its economy. The country's entry into the World Trade Organization in 2004 was an enormous achievement, signaling to the world that, after years of brutal strife and conflict, Cambodia is open for business and ready to play by a common set of rules.

Other positive signs of development are prevalent throughout the country: a growing public participation in government and economic integration, including a dynamic business community and a thriving NGO sector; a growing community of internationally trained young professionals; a gradual efforts to incorporate international commercial practices; and an improving infrastructure for movement of goods, services, and money.

Underpinning the success in international trade is a unique and successful international policy experiment which has been under way in Cambodia in the late nineties in the garment industry. The Cambodian experiment combines roles for local and international actors in previously untried ways. It relies on a combination of private self-regulation with limited but essential interventions by governments and international organizations. In the country's export apparel factories, working conditions and labor rights are monitored by inspectors from the International Labor Organization (ILO) thus offering a potential advantage for foreign investors concerned about their labor market reputation and their corporate social responsibility. Given all of this, Cambodian leaders might feel that they can look back on the past decade with a degree of satisfaction.

## **2. *Economic Divergence***

The economic divergence hypothesis suggests on the other hand that Cambodia's catch-up efforts may be possible, though not necessarily along international best practices, but under the influence of other major different factors typically identified as culture, tradition, and history. The overall economic expansion in the last decade has not brought the so-called "quality of growth" where development has had a positive impact on factors such as the human capital formation; poverty and inequality; the role of the state; and participation, democracy and freedom.

The Cambodian experiences painfully highlighted that the failure of a strategy to produce the predicted results may reflect not a flaw in the strategy or the supporting theory, but a failure to implement the strategy fully and rigorously. The performance of FDI is a good case in point.



Although there may be grounds for cautious optimism with regard to macro-economic development in the coming years, there are good reasons to take a more sombre view of the overall development of the country. Progress, while real, is partial and not clearly sustainable. To date Cambodia has not succeeded in its broadening the base of economic opportunity and jobs through diversification in other potential rich sector as agro-industries. The private sector is exceptionally narrowly-based. With 90 percent of the poor living in rural areas where natural endowments are in abundance, Cambodia has not been able to exploit the full potential of the agriculture sector which suffered from low productivity in crops, depletion of resources in forestry and fisheries, and constrained access to arable land and markets.

Notwithstanding the relative achievements and a perception of wealth and prosperity, there is still an overwhelming feeling of shared disappointment that after a decade of development work, improvements are marginal and the needs of a large percentage of the population have not been met. Slow and irregular growth in agriculture has led to mixed progress in social indicators — health and education —, in widening inequalities in income and, even worse, land ownership. Cambodia's troubled history exacerbated poverty and perpetuated economic inequities. The conflict resulted in the destruction of infrastructure, human capital, and institutions, as well as large proportion of Cambodians being displaced, maimed, orphaned, or widowed. Not surprisingly, these conditions created deep poverty, and the aftermath has been accompanied by widespread economic and social inequities. So far, the results of economic and political reform for the poor has been dispossession on a grand scale. The poor have been increasingly excluded from the customary use of fisheries and forests, and have been driven from their land. There is also concern that the slow pace of key institutional reforms and policies will continue to undermine any progress that has been made to date, particularly within social sectors.

### **3. *Economic Differentiation***

Last, there is a good argument in favor of the economic differentiation hypothesis which suggests that while there are strong signs of policy catch-up in the area of economic integration and trade related areas, Cambodia's institutional structures have not fully converged. Current perceptions of corruption and impunity threaten to

overwhelm the achievements to date. The cost of political peace has been a kind of paralysis in progress on, or even backtracking from, improving governance and reducing corruption. Political peace has been achieved and elections held, albeit at the cost of the creation of a large and complicated top-level bureaucracy. Perhaps the biggest institutional divergence comes from the failure of the reform of its civil service. Many personnel were accepted as being surplus to the requirements of public sector employment, and had been used as a form of welfare, dependent on patronage. Without any form of unemployment benefit, persons were kept on the rolls to provide at least the small salary this afforded to them.

The privatization of land and natural resources has occurred brutally with a lack of transparency. Since the privatisation of agricultural and other land in 1989, the state administration has not been fully able to grapple with land titling, distribution of land, or administering its transactions. The impact on the poor ranges from the rapid environmental degradation in the form of deforestation and large-scale land concessions, over-fishing and depletion and/or expropriation of common property resources, to insecure land rights and other property rights resulting in theft and illegal confiscation of assets, to harassment by local strongmen and officials.

A pessimistic observer could posit that Cambodia today in fact faces the significant risk of becoming the laggard of the Asia Pacific. Significant evidence could be marshaled to paint a bleak picture of the future and confirm this divergence path, with continued impoverishment of the majority, the loss of almost all forest cover, and ongoing threats of social instability in which corruption, feuding elites, an uncompetitive economy, and a stagnant countryside deny the vast majority of Cambodians an opportunity to enjoy happier, healthier, more prosperous lives.

Culture is another facet confirming the differentiation hypothesis. The issue at stake is to what extent can Cambodia remove or change its cultural factors considered as obstacles to economic development so as to facilitate progress and what are the scope for cultural shift in light of the economic convergence triggered by the globalization of markets?

A reason for believing that current cultural practices, i.e. personal relations between government and business, will not serve as well in the future is that the international economic system itself has changed. The rules of that system, as manifested in institutions like the WTO, are geared to economic systems that are based on the rule of law. Access to the markets of Europe and North America will require Cambodia to strengthen the degree to which its economic system is governed by transparent laws instead of opaque discretionary actions by government officials.

Another main point is that personal ties based on family type relationships are not necessarily superior to alternative ways of providing security for economic transactions. These personal ties would not provide an adequate substitute in a strong modern economy built on a foundation of law. A modern economy with well functioning formal institutions can grow.

The current pervasive beliefs that corruption is a way of life, and that resistance is futile, must be replaced by the beliefs that, *first*, change is possible, *second*, that the knowledge exists as to how this is to be done and, *third*, there exist people with confidence and the motivation to challenge established power-brokers.

Reducing corruption in a significant way will inevitably be a long-term process that aligns: (a) those who have the desire and capacity to establish the fact of corrupt behavior as well as the courage to speak openly about it; with (b) those who are ready, willing and able to deal forcefully with it, without fear of the consequences, once the facts are proven. In this way, entrenched attitudes and behavior will need to be altered by the examples, on the one hand, of those leaders of the Cambodian society who are widely respected for not being corrupt and, on the other hand, of those who are appropriately punished following their proper conviction of corruption.

Without a fundamental shift in the role of the state and the behavior of the leaders, however, it is unlikely that Cambodia will realize its potential. While donors can play a useful supportive role, the real decisions will have to be made by the Cambodians themselves.

## **B.     *Legal Convergence, Divergence and Differentiation***

### **1.     *Legal Convergence and Divergence***

On the legal side, the Cambodian experience in the last decade has shown that some legal convergence did occur with the process extensively influenced by Western and successful Asian experiences. The policy shift that has promoted the process of legal convergence has largely taken place in the mid 1990s to the present. The legal system in Cambodia in the 80s reflected a time when laws gave way to party policies, at a time when comprehensive state planning had been established. Twenty five years later, the legal system had evolved towards being much more rule-based and provided ample scope for non-state economic activities. The rapid development of the private sector, the expansion of international trade and the growing internationalization of markets, and the increasing complexity of market transactions created a demand for new laws and regulations. Evidence for these are the consumer protection, investment, business registration, and intellectual property laws, among others, that were enacted during the period. In the area of dispute settlement, the rates for litigation concerning civil and commercial disputes increased dramatically over the last decade in Cambodia, thus lending support to the convergence hypothesis.

Cambodia's institutional framework for the granting and protection of property rights, political leadership and the bureaucracy remains largely divergent. The current shape and structure of the Cambodian legal system is largely path-dependent on geopolitical influences and contemporary historical distortions. Cambodian leaders did make efforts to establish substantial review rights in the post peace process, but took them back in times of political crisis. Politics has been an important factor in determining the commitment of the state to implement legislation. In many situations, implementation of laws is usually delayed until a major political shift has occurred. Indeed, the notion of calculability and predictability, so essential to a functioning market economy, is persistently lacking.

## **2.     *Legal Differentiation***

The Cambodian legal experiences also supports the legal differentiation hypothesis which suggests that different parts of the legal system behave differently, with some parts showing signs of convergence and others developing along a more idiosyncratic path:

(a)     While there are strong signs of catch-up in the area of legislative development, Cambodia's institutional structures and their enforcement mechanisms either have not converged, or worse have persistently resisted change. Weak institutions and limited mechanisms of accountability, which are legacies of Cambodia's recent history, contribute to high levels of corruption and to the country continuing to operate far below its economic and social potential. Along the allocative dimension, the legal system gradually placed considerably more emphasis on markets, but has retained extensive state controls. In contrast to the overall pattern observed in other Asian economies, the trend towards a more market-allocative legal system since the mid-1990s has not resulted in a strengthening of rule-based law. The recent rise of modern Cambodia and its market-driven economy has not generally been accompanied by the development of the rule of law, nor the institutionalisation of rule of law norms in its commercial legal regime.

(b)     While there are strong signs of convergence in the shift from state- to market-allocative law, the procedural dimension of law has proved to be more path-dependent. Legal processes continue to work quite differently from those in the West. The discretionary power of the state increased rather than decreased during a period when economic policies shifted back from state centered to market based strategies. The important point is that 16 years after the peace process in Cambodia, despite the trend from state- to market-allocative, and from discretionary to rule-based law, differences in legal systems between Cambodia and the West have remained considerable.

Even though some adaptations to a changing environment may take place, overall institutional behavior changes only at the margin. Change is taking place, but at a considerably much slower pace than in substantive law. Judicial review continues to

be non-existent and the government continues to exercise substantial discretion by interpreting guidelines for foreign investors, by intervening in transactions in land, in consumer protection, and in infrastructure projects. Broad and often vague laws that left ample discretion with the executive are still seen by much of the public as a source of non confidence and trouble for the economy. The remaining gaps in the legal system and the extensive discretionary power of the state and political party officials continue to suggest that Cambodia still remains more discretionary than the other advanced Asian economies; and

(c) While the case load of courts increased substantially, the volume of human and financial resources extended to the court system did not reflect this. The minimal budget allocation to the court system and the frequent interference by the executive power have justifiably raised serious doubts about the Government's commitment and political will for the realization of an independent judiciary. For more than a decade following the peace process, the support to the judicial reform process has been conspicuously weak, mainly due to lack of visible commitment from the Government.

The Council on Legal and Judicial Reform has produced a lengthy and detailed multi-year reform agenda that calls for reform of the governing legal institutions, the passage of significant new laws, and the tackling of judicial corruption. The plan is an admirable model document, but so far there has been no serious effort at the highest political levels to achieve its major provisions.<sup>650</sup> Despite a number of laws existing on paper, a sense of lawlessness prevails owing to the failure to implement them, the issue of impunity, and the lack of independence of the judicial system. These issues as reflected in several resolutions of the Commission on Human Rights and the UN General Assembly provide further evidence for the proposition that judicial institutions evolve at a slower pace than the growing demands of the markets and the society at large.

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<sup>650</sup> Royal Government of Cambodia (RGC), *Legal and Judicial Reform Strategy*, above n 641.

## **II. CAMBODIA AT THE CROSSROADS**

In the last few decades Cambodia went through a dizzying process of change: the collapse of communism, the gradual dismantling of socialism, the peace process followed by the lifting of the economic embargo, a period of state consolidation and state-building, and a difficult economic reconstruction. In the process of transforming its economy from one that was organized along central planned lines to one that is market-oriented Cambodia faced many challenges. The scope for catching up will inevitably be a long process because of the legacy of more than two decades of war and internal strife and the extensiveness of the nation rebuilding required.

Cambodia will continue to undergo changes in response to the impacts of war, the massive capitalist penetration, the gradual democratisation process, the inexorable pace of modernisation and the increasing influence of regional and international trade. These developments are likely to bring further adjustments to the social and symbolic structure of the Cambodian society in their wake.

Looking from a more holistic approach, Cambodia could secure its process of resurgence and leap forward provided it could tackle such a daunting and complex development agenda of addressing simultaneously sustainable growth and reducing inequality. There is certainly a need to sustain macroeconomic stability and high rates of economic growth. But there is also a need to broaden the base of growth, in particular by improving agriculture, and implementing other key measures to remove constraints on faster poverty reduction and human development. Greater economic diversification, improvements in agricultural productivity and profitability, and stronger regional integration will all be necessary for maintaining high growth and poverty reduction.

In other words, Cambodia is at a crossroads and it had to make a decisive choice going forward. Viewed in the context of its tragic recent history, the country's achievements over the past 16 years are notable, but moving forward it is uncertain what direction Cambodia will elect to follow. One could argue that Cambodia is following, albeit hesitantly, the development path blazed by its dynamic neighbors, with export-led growth fueling increases in standards of living and steadily declining

poverty. Garment exports and WTO accession are indicative of this trend. Cambodia's greatest opportunity will be the new revenue which will be generated by the exploitation of the country's offshore oil and natural gas deposits. With appropriate policies oil revenue could be used to address the country's key weaknesses, including rural stagnation and decline.

Cambodia has embarked on the path of reform but now needs to take the necessary actions to move aggressively in key areas such as governance and anti-corruption, while continuing to show momentum, commitment, and political will in all reform areas. If history is to be learned from, a failure to act on the governance front will lead to a failed policy implementation which in turn will lead to a failed economy, and maybe a failed state. Despite important progress in rebuilding institutions, key areas of governance require reforms including addressing corruption, the legal and judicial system, public administration, and local governance.

It will take more than the policies to transform governance in Cambodia so that it is supportive of, and not destructive to, the development process. Despite much effort being devoted to policy formulation, the implementation of reforms has been slow. What is needed is a concerted effort to strengthen, and in many cases to build from scratch, the foundations of a modern chain of accountability. Such a reform effort will necessarily take a long time to implement, far longer than the life of the current government mandate. But if the current trends in governance can be reversed, and if the foundations are laid in a few key areas for enhancing accountability, a good beginning will have been made and strong signals sent to all players in the economy that the rules of the game are changing.

The government leaders could take the new period of opportunity to demonstrate that they themselves are committed to becoming agents of change — through implementing policies and practices that have already been agreed, and by setting in motion further initiatives that will instigate confidence and lead to improvements.

Alternatively, the potential for misuse of the new found oil revenue stream is Cambodia's greatest threat. The large amounts of oil money will tend to accentuate weaknesses and negative tendencies that are so evident in the current environment.



Corruption is often cited as being endemic from the top down and throughout all levels of society. Corruption costs are extremely high and losses from various sources run to hundreds of millions of dollars annually - for illicit payments by business and ordinary citizens; for legal tax and customs revenues foregone; for funds diverted from social programs; for "facilitation fees" on government procurements; for earnings from criminal activities; for funds deposited in overseas banks; for investments not made by foreign and indigenous firms.

But these losses would be pale in comparison to the potential losses in the revenue generated by oil. Cambodia is no stranger to the "resource curse." Indeed, the correlation between the exploitation of forestry and land concessions and a negative impact on the socio-economic sector is so pronounced that it is globally watched and criticized. On the political side, increased access to unrestricted cash from petroleum revenues creates opportunities for rent-seeking behavior and increased corruption. Given the recent tendency to use new government positions to buy peace, the advent of new revenues from oil, free of any donor pressure, could lead to an explosion of overlapping positions and authorities and wasteful and corrupt spending.

In democratic political systems, politicians must constantly seek to build coalitions with groups large and small in order to create the kinds of consensus required to raise taxes to finance government operations. When a substantial portion of a government's operations can be financed out of oil revenues, less motivation for consensus building exists. Rather than seek political coalitions or bargains, oil wealth can result in politicians attempting to increase their access to the cash resources as a means of increasing political control, thereby threatening the development of democratic institutions.

If Cambodia were to combine a government of low responsiveness and efficiency with sharply higher public spending, the results would be growing inequality and political tensions. Even if this unrest could be held down, the cost of doing so and the resulting crime and insecurity would make Cambodia an unattractive location for investment or tourism. Only a political understanding of the danger of this, and a strong response to this danger, would help to prevent its likely occurrence.

Unless the problems are addressed, the nation will fail to capitalize on its potential strengths and spark the process of a vicious circle: the lack of express commitment from the Government would lead to a lack of confidence from the international community. External resources would be reduced. Investors would be skeptical. Ordinary Cambodians would be frustrated and impatient. The rice farms would suffer from low productivity with poor farmers in risk of losing their land. Health and education levels would remain low, reflecting the meager incomes of most of the rural people. The elite Cambodians would contest for the oil rents and choose to invest their savings elsewhere as a hedge against instability. Such a hypothetical society could not be called successful.

Avoiding that outcome requires a shift from buying short-term political stability to investing in a more efficient and inclusive kind of economic growth, which should also have benefits for longer-term political stability. Such a shift is not easy, but the benefits of the change would be very high.

### **III. MOVING FORWARD**

Looking to the future, the pressure to catch up with other fast moving economies in the region will not provide any room for complacency given Cambodia's vulnerability and pressing need to alleviate poverty. The challenge for Cambodia in the next 15 to 20 years is to strengthen governance in order to attract more private investment and ensure competitiveness vis-à-vis neighboring countries so that the country can gain from its potential whether in agriculture, industry, tourism or in some other production and services sector. With increasing exposure to greater international competition, peace while necessary is not sufficient to guarantee growth. Significant actions will be needed in the period ahead to firmly establish a basis for promoting sustainable growth and reducing poverty.

At this crucial stage of an economic take off, the causal connection between the development and the institutionalization of the rule of law will clearly matter. Cambodia economic challenges will thus be closely tied to the deep rooting of a credible legal system. Pressing on the issues of economic governance and transparency should be at the forefront of the reform agenda, followed by a clear

commitment to establish and operationalize a modern rule-based market mechanism and a credible legal and judiciary system that provide for a clear rule of law and modern commercial laws and practices.

More specifically, substantial improvements need to be made in removing governance-related constraints that limit firms' productivity and in building institutions to enable the development of a strong private sector. Generally, issues of economic governance - inadequate legal and inappropriate regulatory frameworks, lack of transparency, and above all corruption - are clearly critically important in deterring private investment and reducing Cambodia's competitiveness.

Strengthening the justice system and the integrity of the courts is the key to ensuring effective rule of law. The rule of law plays an important role in providing effective guarantees to private investors and ensuring impartial dispute resolution. What is needed in the way forward is a holistic approach to judicial reform, one that addresses both the supply and demand sides. The reform programs must give appropriate weight not only to the “supply side” of legal and justice system services but also to the “demand side” for services, in addition to the supporting “enabling environment” initiatives.

There is also a strong political motive to circumscribe these market driven reforms with a series of cross-cutting reforms to mitigate social unrest and to create a foundation for increased political and social stability. The 1993 Constitution has firmly planted the seeds of such values as democracy, freedom and rights. Nurturing and achieving such values is an ongoing struggle worth fighting for. These values inevitably entail obligations that must be met. The State must be able to protect its rights and those of society as a whole. It must provide a framework and services conducive to empowerment, to development, social justice and poverty reduction.

Land reform is a first priority to address the biased land ownership structure. There is no doubt that conflicts over land resources have contributed in a major way to political and social problems in the country. To secure future political stability, it is essential that land-related problems are resolved. Equitable and secure access to land

can be viewed as part of a social contract, which creates a base for successful future economic, political and social development.

Civil service reform is perhaps the second biggest reform. Amendments to the existing law should be made to ensure the political impartiality of civil servants and to safeguard their integrity and accountability as well as provide just rules of recruitment and promotion on merit. Salary should be structured commensurate with a professional position of honor and trust, that will attract high quality personnel, and that will support a reasonable standard of living without the need for supplementary income. The provision of realistic and equitable salaries that are linked to the cost of living would help to reduce the opportunities or need for corruption. Codes of conduct and a listing of core values should be introduced, implemented, and enforced as they are essential to good governance and necessary in developing accountability and responsibility at all levels of the government.

The last and probably the most difficult is the reform of the Cambodian “economic culture”. Economic, educational, and judicial reforms necessary to Cambodia's modernization cannot be effected unless they are preceded or accompanied by a reform of our customs and ideas, of the whole complex system of habits, knowledge, images and forms that we understand by “culture”. Cambodia needs to change traditional mental models that impede the creativity and efficiency necessary for competitiveness and economic growth. Even if the above mentioned structural changes are successfully implemented, the way forward for real and lasting progress is for the Cambodian people themselves to become agents of change. Like other societies which also may change their culture in response to major trauma, Cambodia has an opportunity to transit from a development-resistant prone culture toward a culture favourable to development. The Cambodian government, if it aspires to the status of industrial country some day, has to create such values if they do not exist, and strengthen them if they are weak. Without the presence of values favorable to economic development, temptations will prevail. Temptations are the bearers of short term expectations, while economic development is a long-term process. The imminent flow of massive oil revenue will create such a temptation and will probably serve as a litmus test for such cultural paradigm shift.

Underpinning the success of the entire reform process is the need to secure the critical support from the donor community. While the necessary reforms can only be implemented with the full commitment of the Government, the mobilization of internal and external resources will be key to the success of all reform efforts. In recent years, Cambodia's large donor community has improved its efforts to coordinate planning, align with government priorities, and harmonize efforts. Development partners must continue to do their part to work in partnership with the Government and other stakeholders in helping the country achieve its development objectives – ultimately, delivering better lives for all Cambodians.”

In conclusion, while the record is still clearly mixed, there is a sense that Cambodia is going down the right path. There is a clear acceleration of reform in many areas and a sense of momentum is being built. But the momentum is still fragile, and reversals are possible. Reform will continue to be painful in the short term but it is vital for Cambodia's economic and social development. Half a generation time from now the long term benefits of these efforts will greatly outweigh any short term pain reforms the country may presently undergo.

Peter D. Sutherland, the current Chairman of BP p.l.c. and Goldman Sachs International and former Director General of the GATT and Founding Director of the WTO, writing about leadership, globalization and changes, quoted :

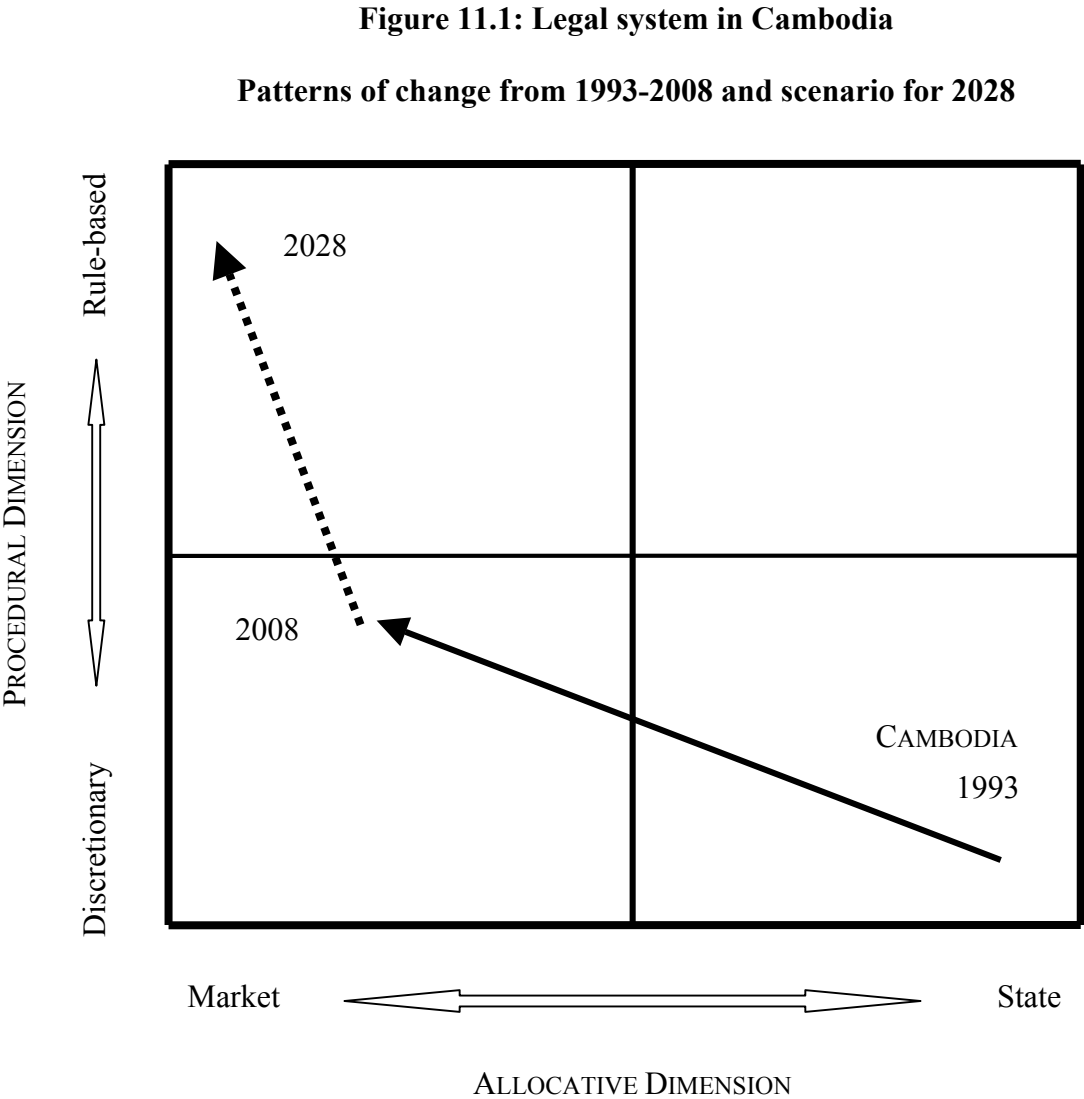
In fact, a better explanation is that at a certain point political leaders understand that fundamental change is necessary, or unavoidable, and that it cannot be achieved without support from the outside. They need a catalyst; the WTO provides it. Change often means confronting vested interests, reducing the role of the state, reforming institutions, and taking on corruption. Change also means shaking up the private sector by encouraging competition, setting entrepreneurs free from government controls, and ensuring efficient and affordable services. In an era of broadening and deepening globalization, small or struggling economies thrive only in an environment that generates opportunity and supports entrepreneurship. Much of what the WTO does is, in fact, about helping achieve good or better governance.<sup>651</sup>

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<sup>651</sup> Peter D. Sutherland, 'Transforming Nations : How the WTO Boosts Economies and Opens Societies' (2008) 87(2) *Foreign Affairs* 126.

In sum, the Cambodian experience, while balancing to some extent the other two convergence and divergence hypotheses, validates the strength of the *differentiation hypothesis* as the dominant hypothesis. The dominance of the differentiation factors explains why Cambodia, while having the necessary ingredients and possibilities to skip the learning curve or leap frog, did experience only a minimum quantum of the leap frogging process. Due to the tension between the various differentiating factors, the pace and effect of the leap frogging process was uneven and not across the board. Nonetheless, taking into account the ‘Ground Zero’ starting point, the decades of war and authoritarian government, the fragile peace, the multiple-fold transition that Cambodia went through since the late 1980s - from civil war to peace, from one-party rule to multi-party democracy, and from economic isolation to integration – there is a merit in supporting the argument that Cambodia, as still a post-conflict society and political system, has decently done well, and that the leap frogging process, though minimal, can serve as a foundation pillar for skipping the learning curve in the future.

Moving into the future, there is strong likelihood, if not certainty, of the Cambodian experience inexorably pursuing its path-dependent trajectory well into the next generation affirming in the process the continued validity of the *differentiation hypothesis*. The combined ‘push and pull’ effect, generated from the constant changes of both external and internal factors, will invariably shape and give credence and authority to the *differentiation hypothesis* confirming in the trends and expectations that indeed Cambodia will leap frog, not at a fast pace had the convergence hypothesis be validated, but with a *minimalist* quantum (Figure 11.1).



*Source: Author*

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## ANNEX I: CHAPTER ANNEXES

### Annex 2.1: The Ladder of Preferences: Hierarchy of Access to the U.S. Market

*Presented in descending order of preferential treatment*

Type	Terms	Countries	Prospects for Cambodia
Free trade agreements	Comprehensive duty-free access to the U.S. market	Israel (since 1985), Canada (since 1989), and Mexico (since 1994)	APEC seeks to negotiate free trade by 2010-2020, but Cambodia is not a member of this group
Special trade preferences	Duty-free access for almost all exports other than oil, textiles and apparel, most leather products, and a few other exceptions	Most Central American and Caribbean countries under the Caribbean Basin Initiative (since 1984); Bolivia, Colombia, Ecuador, and Peru under the Andean Trade Preferences Act (since 1991, expires in 2001)	There is little likelihood that the United States would create a special preferential program for which Cambodia would be eligible
Generalized System of Preferences	Duty-free access for many exports, but several significant product areas are excluded, and numerous provisions allow for the removal of specific products or countries	Most developing countries and economies in transition; major exceptions include China, the Asian newly-industrialized economies, and most major oil-exporting countries	Cambodia was designated as a least-developed beneficiary country of the GSP in June, 1997



Permanent normal trade relations	Also known as unconditional most favored nation or non-discriminatory treatment. Countries benefit from tariff reductions negotiated since 1934 (Column 1).	Applies to all countries other than those that are denied NTR or receive it on a conditional basis; major countries that receive NTR but no preferences include Japan, the European Union, and Asian newly-industrialized economies	Cambodia has received unconditional NTR since October, 1996
Conditional NTR	NTR treatment (as defined above) is subject to the freedom-of-emigration provisions of the Jackson-Vanik law	Applies to countries that did not have MFN as of January 3, 1975, have not been “graduated” from Jackson-Vanik, and have reached NTR agreements with the United States	The Jackson-Vanik law never applied to Cambodia
Denial of NTR treatment	Countries are subject to the tariff rates established under the Smoot-Hawley Tariff Act of 1930 (i.e., Column 2)	Afghanistan, Cuba, Laos, North Korea, and Vietnam	Cambodia was in this category from January, 1992 until October, 1996
Trade embargo	Countries are subject to partial or total trade embargoes; some of these countries nominally receive NTR treatment	Cuba, Iran, Iraq, Libya, and North Korea	Cambodia was subject to a trade embargo from April, 1975 until January, 1992

Source: VanGrasstek (2000)

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### **Annex 3.1: Partial list of laws and regulations of the PRK period**

Decree-law No. 01 concerning the decision to establish the People's Revolutionary Tribunals in all provinces and municipalities (15 May 1980); Decree-law No. 02 concerning condemnation for treason committed against the revolution and other illegal behaviour (15 May 1980); Decision on functions and structure of the cabinet of the central United Front for the Salvation of Kampuchea (9 May 1980); Decision on functions and structure of the Trade Union Committee for the Salvation of Kampuchea (21 April 1980); Decision on procedures concerning entry-exit or transit visas to the People's Republic of Kampuchea for foreigners (11 July 1980); Regulation concerning meeting with international guests and their travel in the People's Republic of Kampuchea (11 July 1980); Note on working procedures for the Ministers and Vice-Ministers (Chairmen, Vice-Chairmen of the Committees and cabinets - Ministries) (28 June 1980); Decision on the permission of entry-exit or transit of international flights in the airspace of the People's Republic of Kampuchea (11 July 1980); Decision of the People's Revolutionary Council of Kampuchea (PRCK) relating to fishing in the People's Republic of Kampuchea (2 July 1980); Decision of the PRCK concerning fishing zones (2 July 1980).

Decree-law No. 01 concerning the election of members of the People's Revolutionary Committees of communes or wards (16 January 1981); Decree-law No. 03 concerning the election of representatives to the National Assembly of the People's Republic of Kampuchea (3 March 1981); Circulars relating to the electoral directives and organization to elect the People's Revolutionary Committees of communes and wards (16 January 1981); Sub-decree concerning public order in Phnom Penh Municipality (20 October 1981); Decree-law concerning military offences and their punishments (12 August 1981); Circular concerning the ordaining ceremony for a child in Buddhism (5 June 1981).

Law concerning the organization of tribunals and prosecutors (10 February 1982); Law concerning the organization and activities of the Council of Ministers (10 February 1982); Law concerning the foundation of the National Assembly and the Council of state (10 February 1982); Decree-law concerning the organization of the military tribunal (13 July 1982); Decree-law concerning the legal procedure for

setting up laws and regulations (13 July 1982); Law concerning the safeguarding of State properties (20 August 1982); Decree-law on exploitation taxes (27 November 1982); Decree-law on import taxes (27 November 1982); Law on the organization of the National Assembly and the Council of state (10 February 1982); Law concerning the organization and activities of the Council of Ministers (10 February 1982).

Decree No. 1 concerning the review, reduction or appeal of penal sentences (6 January 1984); Sub-decree No. 20 concerning the establishment of the directorate for construction under the Ministry of Industry (30 October 1984); Sub-decree No. 21 separating the scholastic programmes and book-centre of the Ministry of Education into two units (12 November 1984); Sub-decree No. 29 concerning the establishment and control of higher educational institutes and foreign education (8 December 1984); Sub-decree No. 9 concerning road traffic regulations (21 June 1984); Circular No. 2 of the Council of Ministers on the settlement of the people's administrative recourse (31 January 1984); Circular No.1 of the Ministry of Justice on the legal procedure in penal cases relating to condemnations of less than five years imprisonment (1 March 1984); Circular No. 3 of the Ministry of Justice on the practice relating to the seal of the Tribunal and prosecutor (5 April 1984).

Law concerning the organization of the People's Supreme Court and the Prosecutors-General accredited to the Supreme Court (21 July 1985); Decree No. 28 on the promulgation of the law concerning the organization of the People's Supreme Court and Prosecutors-General accredited to the People's Supreme Court (31 July 1985); Decree-law concerning the suppression of counterfeiting (18 March 1985); Decree-law concerning the preservation of historical and cultural treasures and national monuments (18 March 1985); Decree-law concerning the collection of licence taxes (14 June 1985); Decree-law on the collection of exploitation taxes (14 June 1985); Decree-law on the collection of taxes on goods inside a country (14 June 1985); Decree-law on the living provision for the penal accused and temporarily imprisoned (14 June 1985); Decree-law concerning the obligation to serve in defence of the Motherland (4 September 1985); Sub-decree No. 4 concerning the organization of state affairs of the People's Republic of Kampuchea (26 March 1985); Sub-decree No. 9 concerning the establishment of a unit in charge of external trade transports under the Ministry of Commerce (19 June 1985); Sub-decree No. 10 concerning interest

rates on deposits and credit of the National Bank of the People of Kampuchea (23 July 1985); Sub-decree No. 12 concerning the establishment of a geological ore directorate and a cottage industry directorate under the Ministry of Industry (22 August 1985); Sub-decree No. 19 concerning the functions and structures of the Ministry of War Invalids and Social Welfare (20 December 1985); Sub-decree No. 20 concerning amendment of the statute of collecting patriotic contributions (26 October 1985); Sub-decree No. 27 concerning the establishment and structure of a state enterprise for construction of equal level to the directorate under the Ministry of Industry (20 December 1985); Sub-decree No. 28 concerning the upgrading of the bureau of salaries and labour to department level under the Ministry of Industry (20 December 1985); Sub-decree No. 29 concerning the establishment of the hierarchical organization of departments in the Ministry of Finance (20 December 1985); Sub-decree No. 1 on the functions and duties of the department in charge of the Kampuchean Shipping Agency (8 January 1985); Sub-decree No. 5 on the amendment of the sub-decree concerning public order in Phnom Penh Municipality (24 April 1985); Sub-decree No. 13 on the transport of goods through rivers and seas (30 August 1985).

Law on the amendment of article 12 of the Constitution of the People's Republic of Kampuchea, promulgated by decree No.7 dated 19 February 1986 (7 February 1986); Decree-law No. 30 on the general educational system (20 November 1986); Sub-decree No.2 concerning the restriction of exploiting centres in Phnom Penh (31 January 1986); Decision No. 07 concerning transfer of duties, retirement and disability pensions for State cadres, officials and workers (28 January 1986); Decree establishing procedures to be followed for arrest, detention, indictment and search of person or domicile (12 March 1986);

Decree-law No. 31 on the organization of the ministerial cabinet of the Ministry of Control (15 January 1987); Decree-law No. 32 on the organization of Banteay Meanchey Province (23 January 1987).

Contract law (28 October 1988).

Law on import and export taxes (20 July 1989). Criminal law (20 July 1989);

Marriage and family law (20 July 1989); Law on foreign investment in Cambodia (20 July 1989).

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### **Annex 3.2: List of banking laws and regulations of the State of Cambodia.**

Legislation adopted include (1) the Law on the Supervision of Financial Institutions, (2) the Law on the Management of Foreign Exchange, Precious Metals and Stones and its implementing Sub-decree, (3) the Sub-decree on the Organization and Functioning of the National Bank of Cambodia, (4) the Sub-decree implementing the supervision of commercial banks, (5) Regulation No. 593-01 of January 18, 1993 on maintenance of a quarantine deposit, (6) Regulation No. 993-06 of September 22, 1993 on the creation of foreign exchange market.

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### **Annex 3.3: List of NBC regulations**

NBC Regulation No. 593-208 of November 22, 1993 on the use of Khmer language and domestic currency in the periodic accounting reports; NBC Regulation No. 594-03 of June 30, 1994 on off balance sheet format in addition to the periodic financial reports; NBC Regulation No. 595-47 of March 16, 1995 on interest rate liberalization; NBC Regulation No. 594-73 of May 16, 1995 on refinancing rate; NBC Prakas No. 796-153 BIS of October 25, 1996; NBC Prakas No. B797-147 Pro Kor of December 27, 1997 on conditions for banks and financial institutions; NBC Regulation No. 793-282 of December 30, 1993 on maintenance of required reserves against deposits and other borrowings by financial institutions; NBC Regulation No. 794-001-R3 of January 1, 1994 on minimum capital; NBC Regulation No. 794-78 ( and circular No. 794-002 ) of December 31, 1994 on the classification of and provisions for bad and doubtful debts of commercial banks; NBC Regulation No. 795-01 of January 16, 1995 on monitoring of foreign exchange activities of banks and financial institutions; NBC Regulation No. 795-02 of March 30, 1995 (and circular of March 31, 1995) on late submission of commercial banks' report; NBC

Regulation No. 795-03 of May 22, 1995 (and circular of May 27, 1995) on risk cover ratio capital adequacy ); NBC Regulation No. 795-04 of June 23, 1995 on instruction for monthly statement of assets and liabilities on diskette.

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### **Annex 3.4: List of ILO conventions ratified by Cambodia**

ILO Convention No. 87 on Freedom of Association and Protection of the Right to Organise, 1948; Convention No. 98 on the Right to Organise and Collective Bargaining Convention, 1949; Convention No. 29 on Forced Labour Convention, 1930; Convention No. 105 on Abolition of Forced Labour Convention, 1957; Convention No. 100 on Equal Remuneration Convention, 1951; Convention No. 111 on Discrimination (Employment and Occupation) Convention, 1958; Convention No. 138 on Minimum Age Convention, 1973; Convention No. 150 concerning the ILO Labour Administration, 1978.

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### **Annex 3.5: List bilateral investment protection treaties**

Kram No. CS/RKM/0799/03 of July 19, 1999 for the People's Republic China; Kram No. CS/RKM/0799/04 of July 19, 1999 for the Switzerland Confederation; Kram No. CS/RKM/0799/05 of July 19, 1999 for the Republic of Korea; Kram No. CS/RKM/0799/06 of July 19, 1999 for the Republic of Singapore; Kram No. NS/RKM/0700/06 of July 30, 2000 for the Republic of Indonesia; Kram No. NS/RKM/0700/06 of July 30, 2000 for the Federal Republic of Germany.

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### **Annex 3.6: List bilateral trade agreements**

Trade Agreement with the Republic of Indonesia, Phnom Penh, September 18, 1997; Trade Agreement with the People' s Republic of China, Beijing, July 19, 1997;

Memorandum of Mutual Cooperation on Intellectual Property with Thailand, Bangkok, March 6, 1997; Trade Agreement with Malaysia, February 4, 1999; Agreement Relating to Trade in Cotton, Wool, Man-Made Fiber, Non-Cotton Vegetable Fiber and Silk Blend Textiles and Textile Products with the United States of America, January 1999; Trade Agreement in Textile Products with the European Community, 2000; Trade Agreement with the Lao People's Democratic Republic, May 25, 1998.

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### **Annex 3.7: Membership in multilateral economic organizations**

Cambodia is now a member of: International Bank for Reconstruction and Development; International Monetary Fund; International Development Association; Asian Development Bank; United Nations Development Program; United Nations Conference on Trade and Development; United Nations Educational, Scientific and Cultural Organization; Food and Agriculture Organization; International Fund for Agricultural Development; International Civil Aviation Organization; World Intellectual Property Organization; International Standards Organization; World Health Organization; International Maritime Organization; International Telecommunications Union; World Tourism Organization; Economic and Social Commission for Asia and the Pacific.

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### **Annex 3.8: List of ASEAN Agreements ratified by Cambodia**

Agreement on Media System and Cultural Activities (1969); Multilateral Agreement on Commercial Rights on Non-Scheduled Services Among ASEAN, 1997; Agreement for the Facilitation of Search for Aircraft in Distress and Rescue of Survivors of Aircraft Accidents, 1972; Agreement for the Facilitation of Search for Ships in Distress and Rescue of Survivors of Ship Accidents, 1975; Agreement on the establishment of the ASEAN Secretariat, 1976 and amendment Protocols of 1983, 1985, 1989, 1992, and 1997; Agreement on the ASEAN Food Security Reserve, 04

October 1979; Agreement on the Recognition of Domestic Driving Licenses Issued by ASEAN Countries, 1985; Agreement on Conservation of Nature and Natural Resources (1985); Agreement on ASEAN Cooperation in Energy (1969); ASEAN Petroleum Security Agreement, 1980; Agreement on the Preferential Short-listing of ASEAN Contractors, 1986; Agreement among the Government of Brunei Darussalam, the Republic of Indonesia, Malaysia, the Republic of the Philippines, the Republic of Singapore and the Kingdom of Thailand for the Promotion and Protection of Investment, 1987; Framework Agreement on Enhancing ASEAN Economic Cooperation, 1992; Agreement on the Common Effective Preferential Tariff Scheme for the ASEAN Free Trade Area, 28 January 1992 and amendment Protocol of 1995; Agreement on the Establishment of ASEAN Fund; ASEAN Framework Agreement on Services, 1995; ASEAN Framework Agreement on Intellectual Property Cooperation, 1995; Basic Agreement on the ASEAN Industrial Cooperation Scheme, 02 April 1996; Protocol on Dispute Settlement Mechanism, 20 November 1996; ASEAN Agreement on Customs, 01 March 1997; Memorandum of Understanding on the Establishment of the ASEAN Foundation, 1997; Agreement on the Recognition of Commercial Vehicle Inspection Certificates for Goods and Public Services Vehicles, 1998; Framework Agreement on the ASEAN Investment Area, 1998; Protocol on Notification Procedures, 1998; ASEAN Framework Agreement on Mutual Recognition Arrangements, 1998; and ASEAN Framework Agreement on the Facilitation of Goods in Transit, 1998.

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### **Annex 3.9: List of regulations affecting import and export activities**

MEF Announcement No. 321 of September 8, 1995 and its regulation on the implementation of the pre-shipment inspection services; MEF Announcement No. 213 of July 2, 1996 on rearrangement of rules and regulations on pre-shipment inspection; MEF Prakas No.2 of September 14, 1997 on the implementation of customs tariffs; MEF Announcement No. 474 of July 25, 1997 on rearrangement of rules and regulations on pre-shipment inspection; MEF Prakas No. 342 of May 1997 on turnover tax; MEF Prakas No. 321 of September 8, 1995 on pre-shipment inspection for imported products to Cambodia; MEF Prakas No. 015 of December 18, 1993 on



the amendment of tax items in the provinces and municipalities; MEF Prakas No. 014 of February 4, 1994 on the stamp tax amendment; MEF Prakas No. 0245 of March 7, 1994 on the customs duties reduction; MEF Prakas No. 001 of January 4, 1995 on the amendment of the import customs duties rates on gasoline; MEF Prakas No. 260 of June 21, 1995 on the Procedures to Determine Tax Rates; MEF Prakas No. 293 of August 11, 1995 on the amendment of import custom duties rates on passenger vehicles and other vehicles listed in custom duties table, line 87.03.; MEF Prakas No. 329 of October 2, 1995 on the implementation of custom duties on selected import items; MEF Prakas No. 330 of October 2, 1995 on the determination of export custom duties for rubber latex.

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### **Annex 3.10: List of laws and regulations regulating the military**

Kram No. CS/RKM/197/05 of November 6, 1997 promulgating the Law on the General Military Statutes of the Royal Cambodian Armed Forces; Anukret No. 12/ANK/BK the Establishment of Structure of Council of Armed Forces Demobilization; Anukret No. 47/ANK/BK of May 19, 1999 on the organisation and functioning of the Military Council; Anukret No. 41/ANK/BK of May 12, 1999 on the establishment of the Council for Demobilization of the Armed Forces; Anukret No. 44/ANK/BK of May 17, 1999 on the establishment of the Council for Reform of the Cambodian Royal Armed Forces; Prakas No. 019/99/PRK/MND of October 4, 1999 on the organization and functioning of the Disciplinary Council.

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### **Annex 3.11: List of regulations on public order and security**

Sub-decree on the maintenance of social order in Phnom Penh, in the provinces and municipalities; Sub-decree on the tasks and the organizational structure of the Gendarmerie; Sub-decree on the establishment of the Anti-Drug Bureau; Circular on measures for the confiscation and management the use of weapons and explosives, and the declaration on the discipline of the National Police Forces; Sub-decree No.

29/ANK/BK of April 09, 1999 on the determination of provincial/municipal responsibilities; Sub-decree No. 38/ANK/BK of April 30, 1999 on the control of import, production, sale, exchange, distribution and use of all kind of weapons and explosives; Decision No. 27/SSR of April 2, 1999 on the invalidation of private gun permits; Decision No. 38/SSR of April 27, 1999 on the establishment of a commission to combat cross provincial borders transport of narcotics; Decision No. 01/SSR/RGC of January 04, 1999 on the nationwide command of the Royal Military Police; Circular No. 033/SRC/RGC of February 18, 1999 on the strengthening of security and public order in the Kingdom of Cambodia.

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### **Annex 5.1: Donor initiatives in support of the legal and judiciary reforms**

The support to legal and judicial reform process in Cambodia from the international community has generally been focused on legal reform, in terms of developing various laws and the law-making process in the National Assembly. Very few assistance is directed towards the judicial reform process.

#### **UN agencies:**

- Assistance by the United Nations starts with UNTAC and continues since then. UNTAC's key interventions include the holding a free and fair election in the context of the democratization process. It assists in the capacity-building of institutions by providing support to judicial, legal and institutional reforms, and training of officials in human rights. It also assists the emergence of a civil society, essentially by fostering the development of a free press and indigenous NGOs. The UN Cambodia Office of the High Commissioner for Human Rights (UNCHR) takes up the works of UNTAC in performing these tasks to varying degrees. In particular, it assists in the drafting and implementation of several laws, provides support both to national institutions such as the Commission on Human rights and Reception of Complaints of the National Assembly, and NGOs, including

local media. It provides training of judges, prosecutors and clerks as well as in capacity building for parliamentarians, police, military and prison officials, and encourages the dissemination of information relating to human rights. It has provided a guide on legislative drafting and is active in the translation and dissemination of laws.

- UNDP has supported institutional capacity building, training and access to justice both in the formal and informal sectors across the country. UNICEF has implemented a legal reform package to ensure that new and existing laws are compatible with the Convention on the Rights of the Child (CRC), and provides support in the work on the law against trafficking in women and children. The support includes supplying training of judges and prosecutors in the CRC and support to the Bar Association to develop a program for legal aid to juveniles.

**Multilateral agencies:**

- Since 2002, the World Bank has played a key role in the legal and judicial reform. At the joint request of the government and the main donors, the Bank assumes the lead coordinating role among the donors in matters regarding legal and judicial reforms. Its role entails, *inter alia*: assisting the government in the finalization of the reform strategy and its related action plans; coordinating and ensuring coherence of activities by other donors in the area of legal and judicial reform; and helping to process and coordinate the government's own proposed reform projects. Concrete initiatives are pursued, in particular: support for the Official Gazette; development of a tri-lingual lexicon of legal terms and elementary judicial tools through a pilot court scheme; training of judges and lawyers through its support to the Royal School of Judicial Training and the Bar Association. The Bank has also assisted with the provision of legal experts for the Council of Jurists and the publication of the Official Journal and the jurisprudence of the courts.
- The Asian Development Bank is one of the leading agents in terms of good governance assistance in Cambodia, but not directly involved in human

rights issues. The Bank has supported the development and implementation of a series of economic legislations, such as the Law on Audit, the Land Law, and the Secured Transactions Law.

- The International Monetary Fund has provided legal technical assistance aimed to improve the financial sector legal framework, such as in the area of insolvency and the anti-corruption law.

**Bilateral agencies:**

- Australia has provided support to the legislative branch in the form of workshops and study visits. In the legal and judicial area, its support encompasses the provision of buildings and materials for provincial courts and prisons.
- Canada has focused its assistance in the area of democratic governance to support and capacity building at the National Assembly and the Bar Association. Canada has assisted also in the drafting of the Law establishing the Commercial Court.
- France has assisted in the fields of legal support, training of the judiciary, police reform, and legal education to the Ministry of Justice and the Ministry of Interior. In the area of legislative drafting, France has provided assistance for the drafting of a new criminal code and a new code of criminal procedure. Institution building wise, it has supported the establishment of a school for magistrates and a school for police officials, as well as strengthening the parliament, the Faculty of Law and the Bar Association.
- Germany has provided its support, through German and local NGOs, in the area of capacity building in law drafting.
- Japan has provided technical assistance to the Ministry of Justice in drafting the civil code and the code of civil procedure. Japan has also provided capacity building to the Bar Association.
- Sweden has provided support to Cambodian NGOs with a focus on human rights, gender, legal and election monitoring.

- The UK is active in the area of good governance, but does not have projects supporting directly the democratic governance and human rights areas.
- The US, channelling funds through NGOs and entities like the Asia Foundation, has provided technical assistance to the National Assembly and the judiciary. In particular, it has funded one advisor to the Commission on Human Rights, the opening of the appeal court, a pilot project on assistance to the Battambang court and is in the process of opening a research and documentation Centre at the National Assembly.
- The EC is involved in projects regarding human rights, training of the magistrates and judicial personnel, as part of its Institutional Support Programme.

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### **Annex 6.1: Sources of legal transplant in Cambodia**

Numerous legal sources form the basis of key legislations enacted in the post peace process. The following examples are a good illustration of the extent and diversity of the legal transplant:

1. The Cambodian Code of Civil Procedure (2006) is probably the most extensive efforts of legal transplanting by Japan. The following are legal references Japanese legal experts have used as a basis for drafting the Cambodian Code of Civil Procedures.

- Constitution (Japan), 'Japanese Basic Laws', Hiroshi Oda (ed), Oxford University Press, 1997.
- Old Code of Civil Procedure (Japan), 'The Code of Civil Procedure of Japan, EHS Law Bulletin Series', Eibun-Horeisha Inc., 1890.
- Administrative Litigation Law (Japan), 'Administrative Case Litigation Law, EHS Law Bulletin Series', Eibun-Horeisha Inc., 1996.
- Civil Execution Act (Japan), 'Doing Business in Japan', Zentaro Kitagawa (ed),

Matthew Bender & Company Incorporated, 1999.

- Civil Provisional Relief Act (Japan), ‘Doing Business in Japan’, Zentaro Kitagawa (ed), Matthew Bender & Company Incorporated, 1999.
- Code of Civil Procedure (Japan), 1999.
- Rules of Civil Procedure (Japan).
- Commercial Code (Japan), ‘Japanese Basic Laws’, Hiroshi Oda (ed), Oxford University Press, 1997.
- Court Organization Law (Japan), ‘Court Organization Law of Japan, EHS Law Bulletin Series’, Eibun-Horeisha Inc., 2001.
- Law of Procedure in Actions Relating to Personal Status (Japan), ‘Law of Procedure in Actions Relating to Personal Status, EHS Law Bulletin Series’, Eibun-Horeisha Inc., 1997.
- Code of Civil Procedure Rules (Germany), ‘The Code of Civil Procedure Rules of the Federal Republic of Germany of 30 January 1877’ and ‘The Introductory Act for the Code of Civil Procedure Rules of 30 January 1877’, Simon L. Goren, Fred B. Rothman & Co., 1990.
- Code de Procédure Civile (France), ‘New Code of Civil Procédure’, Editions Dalloz, 2002 [trans of : *Nouveau Code de Procédure Civile, 96e édition*].
- Procédure civiles d'exécution (Loi n° 91-650 du 9 juillet 1991) (France), ‘Nouveau Code de Procédure Civile, 96e édition’, Editions Dalloz, 2002.

2. The Law on Negotiable Instrument is based on the Uniform Laws of Bills of Exchange and Promissory Notes and of Checks of the Geneva Conventions of the 1930s. These sources form the basis of the law of negotiable instruments in Continental Europe and civil law jurisdictions worldwide.

3. The three intellectual property rights laws (the Marks Protection Law, the Patent and Designs Law and the Copyright and Related Rights) have received substantive technical inputs from the World Intellectual property Organization (WIPO) which ensure their compatibility with Cambodia’s obligations under the Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPS Agreement).

4. The Law of Commercial Enterprises is a mixed of romano-germanic origin and anglo-saxon concept. The provisions regulating general and limited partnerships are from romano-germanic origin and are in harmony with the civil law tradition of the country (the Cambodian Code de Commerce of 1951 (as revised in 1961). The partnerships provisions are based on French law and the Québec Civil Code. The provisions regulating both private and public limited companies are from anglo-saxon origin. The Corporations Act, Title 8 of the State of Delaware, United States of America and the Canada Business Corporations Act – Chapter C-44 were used to model these provisions.

5. The Commercial Arbitration Law is drafted to comply with international standards and treaties, in particular with the guidelines of the United Nation's New York Convention of the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"). Numerous international commercial arbitration models, rules, procedures, and sources, such as the UNCITRAL, the ICC, the LCIA, the HKIAC, and the AAA, were reviewed.

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**Annex 9.1: Update status of the Legislative and Regulatory Action Plan**  
WTO Work Program Revision implemented by Ministry of Commerce, as of 24  
October 2007

No.	Topic/ WTO Reference	Task/ Deadline/Technical Assistance	Comments and Status
<b>MINISTRY OF COMMERCE</b>			
1.	Inter-Ministerial machinery / WP Report Para 39	Re-define the Inter-Ministerial Coordinating Committee / Asap / No TA needed.	<p>A draft sub-decree has been prepared to establish a new Inter-Ministerial Committee to implement the WTO commitments. Its full function is expected soon. At the moment the previous Think Tank continues to carry out its duty.</p> <p><u>Updated as of October 2007:</u>  Sub-Decree on Inter-Ministerial Coordinating Committee to implement WTO Commitments has been adopted in March 2007.</p>
2.	Commercial Court / WP Report para. 35 and 36	Pass law establishing commercial court / June 2005 / No TA needed.	<p>Being reviewed at MOC. There are different approaches by MOC and MOJ. MOJ intends to set up special Chambers of regular courts dedicated to commercial issues. The draft Law on Judicial Organization allows for the establishment of special courts, so a Commercial Court could be established after this Law is adopted. The question is how the procedures in a Commercial Court would differ from those of a Commercial Chamber in a regular court.</p>



No.	Topic/ WTO Reference	Task/ Deadline/Technical Assistance	Comments and Status
			<p><u>Updated as of 31 January 2007:</u></p> <p>The Government made a decision to allow Commercial Court to be established in the form of Special Court. UNDP will fund one legal expert to review the law, starting from Feb and expected to finish within two months time.</p> <p><u>Updated as of October 2007:</u></p> <p>Draft being discussed among experts and relevant institutions. Waiting for further comments from MoJ, if it still not finds any common stand, the draft will be sent to the Council for Judicial Reform to help facilitating the process.</p>
3.	Competition Policy / WP Report para. 28	Draft and pass law on Competition / Asap / UNCTAD is providing TA.	<p>Economic mapping out by MUTRAP was completed. Two workshops have been held. UNCTAD has assisted in the preparation of a draft law. The draft has been examined by a working group set up by MoC. The draft is being finalized.</p> <p><u>Updated as of October 2007:</u></p> <p>Reviewing of final draft is completed by experts. Waiting to be sent to the Council of Ministers.</p>

No.	Topic/ WTO Reference	Task/ Deadline/Technical Assistance	Comments and Status
4.	Commercial arbitration / WP Report para. 33, 36	Draft and pass law on commercial arbitration / 01 January 2005 / No TA needed.	<p>Promulgated on 5 May 2006</p> <p><u>Updated as of 28 June 2007:</u></p> <p>The Sub-decree to establish the National Arbitration Center is being drafted at MoC.</p> <p><u>Updated as of October 2007:</u></p> <p>The first draft Sub-Decree to establish national Arbitration Center is finalized and being placed for public consultation and comments.</p>
5.	Anti-dumping, safeguards and countervailing measures / WP Report para. 106, 108	Draft legislation / 01 January 2005 / TA needed.	Drafting is being prepared in MoC. Status is not changed as of October 2007.
6.	Anti-dumping, safeguards and countervailing measures / WP Report para. 108	Notify relevant legislation and regulations to WTO / Asap after adoption of laws / No TA needed.	Waiting for the law to be passed first.
7.	Legal framework for business / WP Report Annex I Attachment	Draft Law on Commercial Enterprises / Early 2004 / No TA needed.	Adopted and promulgated on 19 June 2005. Action completed .

No.	Topic/ WTO Reference	Task/ Deadline/Technical Assistance	Comments and Status
8.	Special Economic Zones / WP Report para.151 and Annex I Attachment	Draft Law on Export Processing Zones (with CDC and MIME) / Asap / No TA needed.	Sub-decree on SEZ adopted on 29 December 2005. A draft Law on SEZ is under preparation by CDC.
9.	Legal framework for business / WP Report Annex I Attachment	Draft Insolvency Law / Asap / No TA needed.	<u>Updated as of 23 October 2007:</u> Passed by National Assembly on 16 October 2007. Submitted to Senate for approval. Senate will start its debate after 05 working days from the date of submission.
10.	Legal framework for business / WP Report Annex I Attachment	Draft Secured Transaction Law / Asap / TA is being provided.	Passed by the Council of Ministers on 10 June 2005 and submitted to the National Assembly on 3 July 2005.  <u>Updated as of October 2007:</u> Promulgated on 24 May 2007. Selection of Financial Institution as partner to implement this law – (A Bank has been selected. Need further training for bank staffs to understand the law).
11.	Legal framework for business / WP Report Annex I Attachment	Draft Commercial Contracts Law / Asap / No TA needed.	Being reviewed by MOC. Draft is being to be finished in 2008.  Status is not change as of October 2007.

No.	Topic/ WTO Reference	Task/ Deadline/Technical Assistance	Comments and Status
12.	Legal framework for business / WP Report Annex I Attachment	Draft Commercial Agency Law / 2005 / No TA needed.	The draft has been completed by MOC.  Status is not changed as of October 2007.
13.	TRIPS: Marks / WP Report para. 206 and Table 12	Put in force sub-decree implementing the Law on Marks / 2004 / TA is being provided by WIPO.	<u>Updated October 2007:</u> Adopted by Council of Ministers on 7 July 2007. The implementation is underway.
14.	TRIPS: IPR border measures / WP Report para.199	Draft sub-decree implementing special border measures contained in Law on Marks (with MEF) / 2004 / TA needed .	<u>Updated October 2007:</u> Border Measure provisions have been included into the Sub-Decree (Chapter IV, Articles 38-42).
15.	TBT / WP Report para 127	Extend ASEAN conformity assessment agreements to all WTO Members (with MIME) / Asap / No TA needed.	ASEAN agreements cannot be extended to third parties by Cambodia, but conformity assessment procedures should be the same for like products, whatever their origin. It is not clear whether this equivalence exists at present.
16.	Trading Rights / WP Report para 44 & 50	Verify and make sure that all registered companies could engage in import and export of all types of goods / Asap / No TA needed.	Issue arises with regard to pharmaceuticals, fertilizers and pesticides. Commercial transaction of these products is prescribed by separated regulations of individual concerned institution.

17.	TRIPS / WP Report para 206, Table 12 (MoC as Secretariat of Intellectual Property Rights Coordinating Committee)	Secure Cambodia's membership in Berne, Geneva Phonogram, and Brussels Satellite Conventions and the Patent Cooperation Treaty / 2004-2005 / TA needed for the membership of Bern and Geneva Phonogram Conventions. No TA is needed for PCT.	Cambodia has requested membership in the PCT, and MIME as a member of the committee, will push for the ratification of PCT after issuing Declaration. The application has been submitted to the Council of Ministers.  <u>Updated as of October 2007:</u> Translation of PCT is required and it is underway.  For Bern and Geneva Phonogram conventions, the committee is in the process to request from WIPO a study on the social and commercial effects of these memberships. The MCFA is currently working on the translation of the Berne and Geneva Phonogram Conventions.
18.	TRIPS / WP Report para 206, Table 12	Draft Law on Geographical Indications / 2004 / TA is being provided by France.	<u>Updated as of October 2007:</u> Drafting completed. Currently being discussed at the ministerial level. Will be submitted to the Council of Ministers in 2008.  Further study to identify Cambodian GI is conducted under the assistance of EU (AFD, France).
19.	TRIPS / WP Report para 206, Table 12	Draft Laws on Layout Designs, Undisclosed	Draft Law on Layout Design of integrated Circuit is completed in Khmer on basis of TA from WIPO.

		<p>Information and Plant Variety Protection / 2005 / Further TA needed probably from Australia (CATAF).</p>	<p><u>Updated as of October 2007:</u></p> <p>Draft of Layout Design of Integrated Circuits is expecting to be finalized in 2008.</p> <p>Draft of Plant Variety Protection law is under debate in the Council of Ministers. Expects to be finalized in CM at the end of this year. This draft will be named Seed management law (the new name is proposed as Seed Management and PVP Law). PVP chapters have been included in this draft. The law will be jointly administered by the two ministries – MIME and MAFF.</p> <p><u>Updated October 2007:</u></p> <p>On Undisclosed information and trade secret, TA is being provided by Canada. Preliminary draft is completed and being sent out to concerned institutions for comments. The second phase for finalizing the comments will be held in Mid December 2007.</p>
20.	TRIPS / WP Report para 206, Table 12	Put into force implementing regulations for laws on geographic indications and protection of undisclosed	The draft Sub-decree for implementing the GI law is completed. It can be sent to the Council of Ministers once the GI law is promulgated.

		information and trade secret / December, 2005 / TA needed.	Status is not changed as of October 2007.
21.	TRIPS / WP Report para 206, Table 12	Put into force implementing regulations for the Law on Layout Design of Integrated Circuits / 2006 / TA needed.	Waiting for drafting of the Law.
22.	TRIPS / WP Report para 206, Table 12	Put into force implementing regulations for the Law on Plant Variety Protection / 2006 / TA needed.	Waiting for drafting of the Law.
23.	TRIPS / WP Report para 206, Table 12	Join International Convention for the Protection of New Varieties of Plants / December, 2005 / No TA needed.	After the adoption of the above drafted law.

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## ANNEX II: CHRONOLOGY

### I. POLICY PERIOD I: PRE-INDEPENDENCE TO 1953

( \* denotes enactment, promulgation, adoption as the case may be)

#### A. *Economic development*

1863 to 1954:

During the French protectorate period, Cambodia is seen as a provider of raw materials and a buyer of finished products

**B.     *Legal and institutional development***

- 1863: Treaty establishes Cambodia as a protectorate of France.
- 1877: The French protectorate authorities attempts to establish modern judicial body to replace traditional Cambodian dispute resolution system.
- 1884: Convention confers full powers on the French protectorate to undertake judicial and administrative reforms.
- 1898: Abolition of slavery.
- 1911: \* Criminal Code and Code of Criminal Investigation.
- 1920: \* Civil Code.
- 1922: A judicial reform birngs about the separation of judicial power from that of provincial governors.
- 1936: \* 3 laws regulating employers and employees relations.
- 1937: \* New Code of Civil Procedure.
- 1941: King Monivong dies and Sihanouk (his 19-year-old grandson) is crowned king by the Vichy French.
- 1945: The Japanese remove the Vichy French in Cambodia in a coup de force and grant Cambodia its "independence" under Sihanouk (13 March). World War II ends and the French return to Cambodia.
- 1946: A 67-member Cambodian Constituent Assembly is elected 1 September.
- 1947 (May 6) the first Cambodian Constitution is promulgated establishing a constitutional monarchy.

King Norodom Sihanouk abdicates and become Head of State.

Transfer of the administration of the Cambodian courts from the French administration to the Cambodian Government. Sihanouk approves



constitution on 15 July (modeled closely on Fourth French Republic). Fresh elections in December.

\* Law on the Functioning of Supreme Council of Magistracy; \* Labor Code.

Ratification of ILO conventions.

1948: Sihanouk dissolves the Assembly and postpones elections. He forms a new government, responsible only to himself, of right-wing Democrats.

Administrative Tribunal is created.

1949: Cambodia obtains independence, with France retaining control of defense, foreign affairs, and internal security.

1950: United States recognizes Cambodia.

1949: High Court of Justice established.

1950: \* Code of Military Justice; Commercial Code.

1951: New elections in August give large majority to Democrats.

1952: Sihanouk dismisses government, forming new government with himself as prime minister: He rules by decree, thus putting an end to political pluralism.

1953: Sihanouk appoints a new government and begins his "Royal Crusade for Cambodian Independence" in France and in western capitals; wins limited independence from France, 9 November.

## **II. POLICY PERIOD II: 1953 -1970: POST-INDEPENDENCE PERIOD**

### **A. *Economic development***

The economy is initially dominated by the trade and investment patterns established during the French colonial rule.

1955 – early 1960s:

Peaceful period of steady economic growth and security: export-oriented agriculture: rubber, rice, corn, soybeans, sesame seeds, kapok, and pepper; emergence of industrialisation process; infrastructure development:

Sihanoukville port, roads, railways, power plants; emergence of urban middle class.

mid-1960s:

Success in product diversification: rice surpluses, organic chemicals, crude jute, headgear, shellfish, and artwork to the United States.

1963: Sihanouk renounces US economic and military aid. Funding replaced by increased aid from USSR and China.

1963-4: Radical economic measures include nationalization of all banking business and import-export businesses – foreign banks are closed and domestic private institutions liquidated.

1969: Nationalized financial sector is completed and totally restructured. Large number of foreign companies move out of Cambodia. Market economy is seriously disrupted.

## **B. *Legal and institutional development***

1953: Cambodia obtains its full independence from France (November 9) Cambodia's independence proclaimed. French-Cambodian protocols grants full sovereignty over military, judicial, and economic matters. The French administration transfers the administration of the Cambodian courts to the Cambodian Government.

Cambodia benefits from *de facto* status as a GATT contracting party as a former colony of France.

1954: The Geneva Conference convenes to settle the Korean and Indochinese conflicts. Cambodian independence is confirmed in the Final Declaration of the Geneva Conference.

1955: Cambodian elections. Sihanouk abdicates in favor of his father, Suramarit, and with his new movement, the Sangkum sweeps the election on 11 September. Military aid agreement is signed with the US in May.

1958: The Sangkum wins massive victory in Assembly elections.

- 1960: Suramarit dies. Sihanouk's neutralist policies are approved by national referendum and the prince is appointed chief-of-state and his mother, Kossamak, appointed to symbolize the throne.
- 1962: Prince Sihanouk seeks international agreement to guarantee Cambodia's neutrality and territorial integrity. Cambodia finalizes negotiations with the GATT Contracting Parties over the terms of its protocol of accession though it never completes the domestic ratification procedures. General elections and all 77 Sangkum candidates are returned unopposed.
- 1966: General elections are held and well over 400 candidates stand. Lon Nol is appointed prime minister.
- 1967: Lon Nol resigns after car crash; Sihanouk forms emergency government.
- ASEAN was founded.*
- 1968: KR launches widespread guerrilla campaign throughout (western) countryside in January, spreading to over half the provinces by the end of the year. Lon Nol returns as defense minister to halt rapidly deteriorating security situation.
- 1969: Cambodia joined ILO.
- 1969: US begins secretly to bomb Cambodia in March. Sihanouk announces resumption of diplomatic relations with the US. Lon Nol appointed prime minister in August.
- 1970: Prince Norodom Sihanouk is deposed by Prime Minister General Lon Nol.

### **III. POLICY PERIOD III: 1970-1975: THE KHMER REPUBLIC: *THE CIVIL WAR***

#### **A. *Economic development***

1970–75:

Cambodia is plagued by a civil war that brings development to a halt. Farming areas are lost due to insecurity and conflict. Intensive US B-52 bombing campaign of Cambodia destroys significant portions of the countryside, contributing to the country's descent into instability.

**B.      *Legal and institutional development***

1970:   (18 March) Sihanouk overthrown. (October) Khmer Republic is proclaimed and the monarchy is officially abolished.

Premier Lon Nol takes power, and Cambodia requests withdrawal of North Vietnamese forces. Prince Sihanouk forms government in exile.

1971:   (20 October) State of emergency is declared (deteriorating security situation, inflation); (16 October) the National Assembly is deprived of its legislative powers.

1972:   New Constitution introduced a new multiparty political system and democratic principles. Ratification of ILO membership and various ILO conventions. The Supreme Council of Courts guarantees the independence of the Judiciary.

1975:   (17 April) Khmer Rouge forces overthrew the Lon Nol government.

**IV.      POLICY PERIOD IV: 1975-1979: DEMOCRATIC KAMPUCHEA (DK): *THE GENOCIDAL REGIME***

**A.      *Economic development***

The entire urban population is forced to leave the cities and to work in the fields. Between 2 to 3 million people died, either from starvation, diseases, or execution. Maoist communist system based on ultracollectivism is implemented: economy is reverted to an agrarian barter system; industrial base and infrastructure is destroyed; disappearance of market or trade, banking system and domestic currency abolished. Complete trade embargo is

imposed by the United States. China pledges generous economic aid (\$1 billion over five year).

**B.     *Legal and institutional development***

1975: (17 April) Khmer Rouge forces overthrows the Lon Nol government. Democratic Kampuchea (DK) is established. The United States evacuates its embassy, withdraws MFN treatment, and imposes trade embargo on Cambodia.

1976: (5 January) the DK Constitution is proclaimed. (20 March) Elections of the People's Representative Assembly. (2 April) Sihanouk resigns as head of state and kept under "palace" arrest.

1979: (7 January) the DK regime collapsed.

**V.     POLICY PERIOD V: 1979-1991: THE PEOPLE'S REPUBLIC OF KAMPUCHEA /  
THE STATE OF CAMBODIA: *RECONSTRUCTION IN THE POST GENOCIDAL  
REGIME***

**A.     *Economic development***

1979: The economy is modelled after the Vietnamese socialist system. Development efforts is based on collectivism with the state owning and operating all enterprises and performing all foreign trade. Real estate, natural resources, and all substantial enterprises are under state ownership. Commercial transactions are mainly conducted in the form of barter with the

rest settled using gold or Vietnamese dong. (26 September) Phnom Penh grants approval to UNICEF and ICRC for large-scale relief operations in Cambodia.

- 1981: The Food and Agriculture Organization (FAO) releases report on food situation in Cambodia—widespread starvation is overcome but economy remains extremely fragile. The food situation deteriorates again during 1981 due to poor weather conditions, making Cambodia dependent on relief aid during the 1982 wet season.
- 1982: Directive of Council of Ministers approves settlement of Vietnamese who had come into Cambodia since 1979 to "engaged in occupations which contribute to the rehabilitation and development of the economy". A new agreement is signed on economic and technological aid with the USSR covering agriculture, transport and communications. Air Kampuchea commences, manned by Soviet pilots flying Soviet planes. Cambodia sends rubber, tobacco, wood and handicraft products to the USSR.
- 1983: Vietnam-Laos-Cambodia Joint Economic Committee is established.
- 1985: Government accepts a larger role for private initiative by relaxing collective organization of agriculture and by recognizing private enterprises.
- 1986: Early market-oriented reforms is introduced: liberalization of prices, privatization of certain state enterprises, and adoption of a two-tier banking system.
- 1989: Broad reform program is launched giving state-owned enterprises greater autonomy in directing and managing their own business, including financial autonomy. Foreign investors are encouraged and state enterprises are granted greater autonomy.
- 1988-91: Cambodia goes through difficult economic situation: collapse of Eastern Europe; end of financial support from the former Soviet Union; continued civil conflict; massive monetization of recurrent budget deficits; triple-digit inflation of 90-177% a year; deep erosion of public confidence in the national currency.

**B. *Legal and institutional development***

- 1978: Vietnamese troops enters Cambodia.
- 1979: (7 January) Cambodia is liberated from the Khmer Rouge Genocide Regime. A newly formed party immediately calls on to assign duties among 66 delegates assembled for congress (elected seven-member Standing Committee). (January 8) announcement of the establishment of the eight-person People's Revolutionary Council (PRC) to rule Cambodia, headed by Heng Samrin. Heng Samrin is reelected president. The People's Republic of Kampuchea (PRK) is established.
- 1980: The Central Bank is re-established. Decision is made on the reintroduction of money to encourage private enterprise and the expansion of agricultural production. India officially recognizes the Heng Samrin regime, the only non-communist Asian country to do so.
- \* Decree-law concerning the decision to establish the People's Revolutionary Tribunals in all provinces and municipalities; \* Decision on functions and structure of the cabinet of the central United Front for the Salvation of Kampuchea; \* Note on working procedures for the Ministers and Vice-Ministers; \* Decision on the permission of entry-exit or transit of international flights in the airspace of the PRK; \* Decision of the People's Revolutionary Council of Kampuchea (PRCK) relating to fishing in the PRK; \* Decision of the PRCK concerning fishing zones; \* Decision on functions and structure of the Trade Union Committee for the Salvation of Kampuchea.
- 1981: (27 June) the PRK Constitution is proclaimed. A Council of State and a Council of Ministers replace the PRC, with party general secretary and defense minister, Pen Sovann, as prime minister. (13 July) UN international conference on Cambodia (representatives of 79 countries plus observers from 25 others) opens in New York and adopts resolution calling for the withdrawal of Vietnamese forces.
- \* Decree-law concerning the election of representatives to the National Assembly of the PRK; \* Sub-decree concerning public order in Phnom Penh Municipality; \* Circular concerning the ordaining ceremony for a child in

Buddhism.

1982: \* Decree-law concerning the organization of tribunals and prosecutors; \* Decree-law concerning the organization and activities of the Council of Ministers; \* Decree-law concerning the organization of the National Assembly and the Council of state; \* Decree-law concerning the organization of the military tribunal; \* Decree-law concerning the legal procedure for setting up laws and regulations; \* Decree-law concerning the safeguarding of State properties; \* Decree-law on exploitation taxes; \* Decree-law on import taxes.

1983: \* Sub-decree on the control of hygiene on import and export goods.

1984: \* Decree-Law concerning the review, reduction or appeal of penal sentences; \* Sub-decree concerning the establishment of the directorate for construction under the Ministry of Industry; \* Sub-decree concerning the establishment and control of higher educational institutes and foreign education; \* Sub-decree concerning road traffic regulations; \* Circular of the Council of Ministers on the settlement of the people's administrative recourse; \* Circular of the Ministry of Justice on the legal procedure in penal cases relating to condemnations of less than five years imprisonment; \* Circular of the Ministry of Justice on the practice relating to the seal of the Tribunal and prosecutor.

1985: (January 14) Hun Sen is elected by National Assembly as chairman of the Council of Ministers. (12 October) Fifth Congress of the Cambodian Communist Party opens and Heng Samrin is re-elected as party general secretary. Heng Samrin announces details of the country's first five-year plan (1986-1990) to concentrate on food supplies, rubber, timber and aquatic products; existence of a mixed economy was an "objective reality of history." Private sector formally legalized and endorsed.

\* Decree-law concerning the suppression of counterfeiting; \* Decree-law concerning the preservation of historical and cultural treasures and national monuments; \* Decree-law concerning the collection of licence taxes; \* Decree-law on the collection of exploitation taxes; \* Decree-law on the collection of taxes on goods inside a country; \* Decree-law concerning the



obligation to serve in defence of the Motherland; \* Decree-law concerning the organization of the People's Supreme Court and Prosecutors-General accredited to the People's Supreme Court; \* Sub-decree concerning the organization of state affairs of the PRK; \* Sub-decree concerning the establishment of a unit in charge of external trade transports under the Ministry of Commerce; \* Sub-decree concerning interest rates on deposits and credit of the National Bank of the PRK; \* Sub-decree concerning the establishment of a geological ore directorate and a cottage industry directorate under the Ministry of Industry; \* Sub-decree concerning the functions and structures of the Ministry of War Invalids and Social Welfare; \* Sub-decree concerning the establishment and structure of a state enterprise for construction of equal level to the directorate under the Ministry of Industry; \* Sub-decree concerning the establishment of the hierarchical organization of departments in the Ministry of Finance; \* Sub-decree on the functions and duties of the department in charge of the Kampuchean Shipping Agency; \* Sub-decree on the amendment of the Sub-decree concerning public order in Phnom Penh Municipality; \* Sub-decree on the transport of goods through rivers and seas.

1986: (February) Government fiat prolongs the National Assembly of 1981 by a further five-year term.

\* Decree-Law on the amendment of article 12 of the Constitution of the People's Republic of Kampuchea; \* Decree-Law on the general educational system; \* Decree-Law establishing procedures to be followed for arrest, detention, indictment and search of person or domicile; \* Sub-decree concerning the restriction of exploiting centres in Phnom Penh; \* Decision concerning transfer of duties, retirement and disability pensions for State cadres, officials and workers.

1988: (20-21 January) Talks in France between Hun Sen and Sihanouk on the question of the political structure of a post-settlement. (25-28 July) first face-to-face talks between all Cambodian factions open in Indonesia. (3 November) the UN General Assembly and ASEAN-sponsored resolution calls for 'creation of an interim administration authority' to govern the country in the period between a troop withdrawal and free elections. Within

Cambodia, state firms granted management autonomy and piece rates are introduced to increase production.

\* Decree-law on contract and other liabilities; \* Decree-law on the organization of the ministerial cabinet of the Ministry of Control; \* Decree-law on the organization of Banteay Meanchey Province.

1989: PRK government recognizes private ownership of land and real estate and the rights of inheritance. (30 April) The State of Cambodia replaces the PRK when the National Assembly adopts numerous amendments to the Constitution which had been proposed by an ad hoc commission: flag changed, Buddhism re-established with its pre-1975 prerogatives, death penalty abolished, private property recognized and free market economy introduced. (26 September) Vietnam completes its troop withdrawal from Cambodia.

\* Decree-law on criminal procedures; \* Decree-law on marriage and family; \* Decree-law on the import and export duties; \* Decree-law on duty drawback; \* Decree-law on foreign investment; \* Decree-Law on the supervision of financial institutions; \* Decree-law on the management of foreign exchange, precious metals and stones; \* Sub-decree on the organization and functioning of the National Bank of Cambodia; \* Sub-decree implementing the supervision of commercial banks.

1990: (28 August) The UN Security Council agrees on a Cambodian peace plan (P-5) demanding establishment of a 12-member Supreme National Council composed of Cambodian leaders from all factions. The SNC would occupy Cambodia's seat at the UN but would turn over most of its powers to the UN until the election of a new government. (10 September) The factions approve the P-5 peace plan in its entirety and commit themselves to placing it within a comprehensive political settlement at a future meeting of the Paris International Conference on Cambodia. Agreed on the formation of a twelve-member SNC which would also occupy the UN seat during the transitional period.

## **VI. POLICY PERIOD VI: 1991-1993: THE UNTAC TRANSITIONAL PERIOD**

### **A. *Economic development***

1991-1993:

The Paris Peace Accords and the subsequent establishment of UNTAC paves the way for Cambodia's renewed access to international financial assistance, including from the International Monetary Fund (IMF). Large foreign exchange inflows associated with the return of refugees from abroad in the early 1990s and the extensive operations of the UNTAC in 1991-92 largely fueled soaring bank foreign currency deposits. The United States opens new mission in Phnom Penh and lifts the U.S. trade embargo. Cambodia rejoins the World Bank Group. An active market for land use rights developed with the passage of the 1992 Land Law.

### **B. *Legal and institutional development***

1991: (1 May) cease-fire proclaimed by all sides in Cambodia. (23 October) the Paris Peace Accords (Agreements on the Comprehensive Political Settlement of the Cambodia Conflict which contains the so- called UN Plan) signed by the four Cambodian factions and 18 foreign ministers. The Supreme National Council (SNC) acts as the unique legitimate body and source of authority. The United Nations Security Council establishes the United Nations Transitional Authority in Cambodia (UNTAC).

1992: (March) UN Transitional Authority in Cambodia (UNTAC) established. Yasushi Akashi, UN Special Representative arrives with John Sanderson, Force Commander. SNC accedes to various other international instruments including the Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

\* Law on Accounting; \* Law on the Establishment of Insurance Business; \* Law on the Supervision of Financial Institutions; \* Law on River Navigation; \* Labour Law; \* Land Law; \* Sub-decree on the management of

foreign exchange, precious metals and stones; \* Sub-decree on corporate accounting records; \* Law on the Establishment of Insurance Business; \* Sub-decree on the administration and control of quality of industry and handicraft products; \* Sub-decree on the supervision of commercial banks; \* Decision on the provisions relating to the judiciary and criminal law and procedure applicable in Cambodia during the transitional period.

1993: (23 May) National elections held.

\* Law on Criminal Procedures; \* Sub-decree on obligation for a company to maintain accounting records; \* Decision on the procedure for export of timber, sawn timber and transformable timber; \* Decision on insurance purchase; \* Regulation on the creation of foreign exchange market; \* Regulation on the maintenance of a quarantine deposit.

(24 September): Adoption of new constitutional monarchy. The Constitution proclaims King Norodom Sihanouk as head of state and establishes a coalition government.

**End of UNTAC's mandate.**

## **VII. POLICY PERIOD VII: 1993-1998: POST PEACE PROCESS – *TRANSITION TO A DEMOCRATIC AND MARKET ECONOMY***

### **A. *Economic development***

1993: Full U.S.-Cambodian diplomatic relations is re-established.

1994: Cambodia applies for accession under article XII of the Agreement Establishing the World Traded Organization. A WTO Working Party on Cambodia's accession is established.

- 1995: Cambodia become a member of the World Intellectual Property Organization (WIPO). The House of Representatives approves bill to extend Normal trade Relations (NTR) treatment to Cambodia. Investment Incentive Agreement is signed with the US.
- 1996: Senate amends and approves bill to grant NTR treatment to Cambodia. The House approves the amended bill, President Clinton signs it into law. Cambodia petitions for designation to the US Generalized System of Preferences.
- 1998: Cambodia become a member of the Paris Convention for the Protection of Industrial Property Rights.

1993-1998:

Comprehensive macroeconomic and structural reform programme is initiated: public finance reforms; fiscal reforms; financial sector reforms; public sector restructuring; civil service reforms; foreign direct investment reforms. The focus is on maintaining macroeconomic stability, strengthening the banking and financial institutions, implementing fiscal reform measures, ensuring a sound management of public property, and increasing public investment to develop the physical and social infrastructure and human resource of the nation.

Trade policies, pricing and exchange rates are greatly liberalized. Major customs reforms are instituted and a taxation structure established. Restrictions limiting the ability of firms and individuals to engage in international trade largely are removed. Number of state enterprises are substantially reduced through privatization and leases. A two-tier banking system is introduced and subsequently reformed. Few restrictive quantitative restrictions or exchange controls remain. Arrears with the IMF are cleared and the relations resumed. The investment regime is open and numerous bilateral investment agreements are signed. Policy coherence between trade regime and foreign direct investment regime is developed.

1997-98:

Political tension leads to armed clashes and the ouster of the First Prime Minister. External aid are suspended or terminated. FDI declines

progressively reflecting a loss of confidence. The economy records near zero growth rate.

**B. *Legal and institutional development***

1993: Formation of coalition government

\* Law on Criminal Procedure; \* Law on Budget; \* Financial Management Law; Sub-decree on the organization and functioning of the Ministry of Interior.

1994: \* Law on the Organization and Functioning of the Council of Ministers; \* Law on the Investment of the Kingdom of Cambodia; \* Law on Immigration; \* Law on the General Statutes of the Civil Service; \* Law on the Organization and the Functioning of the Supreme Council of Magistracy; \* Sub-decrees organizing ministries and state secretariats; \* Royal decrees establishing state administrative reform councils; \* Sub-decree on disciplinary sanctions for civil servants; \* Sub-decree on the Administrative Structure of *Khum* [commune] or *Sangkat* [district]; \* Sub-decree on conferring the right to sell and export rubber products to the Ministry of Agriculture, Forestry and Fisheries; \* Sub-decree on the creation of a National Permanent Commission for coordinating the privatization and the promotion of rubber plantations; \* Circular on the registration of business legal entities.

Agreement on Economic and Trade cooperation and Vietnam; Agreement on Transit of Goods with Vietnam; Agreement on Transit of Goods with Lao PDR; Agreement with Malaysia on Economic, Scientific and Technical Cooperation.

1995: \* Law on the Bar; \* Law on the Press; \* Law on the Chambers of Commerce; \* Law on the Statute of State Enterprises; \* Law Bearing upon Commercial Regulations and the Commercial Register; \* Sub-decree on public procurement; Sub-decree on financial control; \* Sub-decree on the general rules and principles governing public accounting; \* Sub-decree on the modalities for privatizing public enterprises; \* Sub-decree on auditors of public enterprises; \* Sub-decree on the export of Khmer labour to work

overseas; \* Sub-decree on abolishment and installation of border check points; \* Sub-decree on the organization and functioning of the Council for Development of Cambodia; \* Instruction Circular on the privatization of public enterprises;

Trade Agreement with Lao PDR; Agreement with the Russian Federation on Economic and Trade Relations; Agreement with the Russian Federation on Cultural and Scientific Cooperation; Memorandum on Economic and Trade Relations with the Philippines.

1996: \* Law on the Organization and Conduct of the National Bank of Cambodia; \* Law on Banking and Financial Institutions; \* Law on the General Statutes of Public Enterprises; \* Law on Nationality; \* Law on the Management of Pharmaceuticals.

Law on the ratification of the Convention on Climate Change; Law on the Ratification of the Convention on Wetlands of International Importance Especially as Waterfowl Habitat. Agreement on trade relations and intellectual property rights protection with US; Investment protection agreement with China; Agreement on trade, economic and technical cooperation with Thailand; Investment protection agreement with Swiss Confederation; Investment protection agreement with Singapore.

1997: \* Law on taxation; \* Law on foreign exchanges; \* Labour law; \* Decree on the general principles of the organization of the civil service; \* Decree on the articles of association of administrative institution; \* Sub-decree on the implementation of the Law on the general statutes of public enterprises; Sub-decree on Build-Operate-Transfer (BOT) contract; \* Sub-decree on the implementation of the Law on Investment; \* Sub-decree governing public procurement in the Kingdom of Cambodia.

Trade Agreement with China; Trade Agreement with Indonesia; Investment Protection Agreement with Korea; MoU on Intellectual Property Cooperation was signed with Thailand.

*Political crisis .....Asian financial crisis*

1998: \* Law on the Organization and Functioning of the Constitutional Council; \* Sub-decree No. 11 on Built-Operated-Transfer (BOT); \* Sub-decree on standards and management of agricultural materials.

Trade agreement with Vietnam; Trade Agreement with Lao PDR – MFN granted.

## **VIII. POLICY PERIOD VIII: 1999-PRESENT: FULL PEACE PERIOD – *DEVELOPMENT AND ECONOMIC RE-INTEGRATION***

### **A. *Economic development - Macro-fiscal structure stabilization and progress***

Period of ownership of a credible program of structural reform aimed at tackling the impediments to broad-based growth and poverty reduction. Concerted attempt to change the revenue structure, to reduce the share of taxes on foreign trade and to increase the share of taxes on domestic goods and services.

*Garment sector:* phenomenal growth due to preferential access to 26 countries (Generalized System of Preferences), and particularly following the US and the EU granting the Most Favored Nation (MFN) status in 1997. Garment exports increased from \$28 million in exports in 1995 to over \$2.2 billion in 2005, employing over 300,000 people.

*Tourism sector:* Cambodia received 1.4 million tourists in 2004 from a low 100,000 tourists in the early 1990s leading to a massive economic expansion (attracting foreign investments, creating jobs and generating income for the local people) in Siem Reap and in the Capital. Positive effects from the "*Open Skies*" *Tourism Policy*.

*Construction:* With an average annual growth rate of 13% the sub-sector recorded the highest growth accounting for more than a third of the industrial sector. Its relative important is explained by the fact that the country came out from a total devastation during the civil war, which emphasized the need to rebuild everything, including private house, administrative and commercial building.



- 1999: Cambodia submitted its Memorandum of Foreign Trade Regime to the WTO Secretariat.
- 2000: 1st and 2nd Government-Private Sector Forum.
- 2001: Creation of 7 Government-Private Sector working groups: Agriculture and Agro-industry; Tourism; Manufacturing and Distribution; Legislation, Taxation and Governance; Services including Banking and Finance; Energy and Infrastructure; Processing for Export.
- 3<sup>rd</sup> and 4<sup>th</sup> Government-Private Sector Forum.
- Appointment of Ambassador to the Permanent Mission of Cambodia to the WTO.
- Appointment of a large think tank on matters related to Cambodia's accession to the WTO.
- Adoption of the Financial Sector Blueprint (2001-2010).
- Renewal of the US Textile Agreement for another 3 years.
- 2002: 5<sup>th</sup> and 6<sup>th</sup> Government-Private Sector Forum.
- ASEAN Leaders and China has entered into a Framework Agreement with the aim of establishing an ASEAN-China FTA within the next 10 years.*
- Establishment of the Inquiry Points for (1) Services, (2) SPS, (3) TBT, and (4) Legal compliance with WTO agreements.
- Development Master Plan for Vietnam - Cambodia - Laos Border Area.
- Cambodia and Canada signed an MoU on Least Developed Countries Initiative providing for tariff rate of zero to all eligible textile and apparel goods exported from Cambodia.
- 2003: Accession to the WTO at the 5<sup>th</sup> WTO Ministerial Meeting in Cancun.
- Cambodia launched Open Sea Policy to open more international ports.
- 2004 : Adoption the Rectangular Strategy for Growth, Employment, Equity and Efficiency in Cambodia
- 2005 : Discovery of large offshore oil reserves which could contain around 700

million barrels of oil.

IMF extends 100 percent debt relief to Cambodia under the Multilateral Debt Relief Initiative.

Launch of the Private Sector Development Strategy for Cambodia

2006 : Adoption of the new PRSP — the National Strategic Development Plan 2006–10 (NSDP).

Cambodia normalizes debt relations with other Paris Club creditors.

Cambodia receives speculative-grade sovereign credit ratings of B+ from Standard and Poor's and B2 from Moody's, which could provide an opportunity for commercial borrowing.

2007: Launch of the Trade Integration Strategy (Trade Sector Wide Approach – Trade SWAP)

## **B. *Legal and institutional development***

### **1999: Membership of ASEAN**

\* Law on Banking and Financial Institutions; \* Law on the Amendments of the Commercial Rules and Commerce Register; \* Decree on the Establishment of the Supreme Council of State Reform; \* Sub-decree on value added tax; \* Sub-decree on the organization and functioning of the Ministry of Economy and Finance; \* Sub-decree on the establishment of the Administrative Reform Council; \* Sub-decree on Environmental Impact Assessment process; \* Sub-decree on Solid Waste Management; \* Sub-decree on Water Pollution Control; \* Regulations on the provision of customs duty exemption incentives for support industries in subsequent years and authorization for shares transfer; \* Regulations on the roles and responsibilities of group in charge of quarantine at border checkpoints; \* Regulations on measures against food products devoid of appropriate packaging labels; \* Regulations on the registration of industrial products; \* Notice on requirement to all foreign entities accompany with evidence of innocence for filling application form; \* Notice on the obligations to provide

information regarding the import and export activities of investment enterprises.

\* Law on the adoption of the membership of the Kingdom of Cambodia to the Multilateral Investment Guarantee Agency; Ratification of ASEAN Agreement on Customs; Bilateral Textile Agreement with the US – MFN with conditions; Bilateral Textile Agreement with the EU; Trade Agreement with Malaysia.

2000: \* Insurance Law; \* Audit Law; \* Law on the Management of Quality and Safety Products and Services; \* Sub-decree on forest management concessions; \* Regulations on trading activities of commercial companies; \* Instructions Circular on the management and usage of CDC/CIB investment incentives by investment enterprises.

Pre-shipment Inspection Agreement with SGS; Trade Agreement with Brunei Darussalam.

2001: \* Land Law; \* Sub-decree on industrial standards.

Ratification of the International Center for Settlement of Investment Disputes Convention ("ICSID convention").

2002: \* Law on Forestry; \* Law on Corporate Accounting, Audit, and the Accounting Profession; \* Law on Marks, Trade Name and Acts of Unfair Competition.

Two agreements with Turkey : (i) General Trade Agreement, and (ii) Textile and Clothing Agreement; Trade Agreement with China; Trade Agreement with Korea; Trade Agreement with India; Ratification of Protocol 8 on the sanitary and phytosanitary measures to implement the ASEAN framework agreement on the facilitation of goods in transit; Ratification of Agreement on the Facilitation of Cross-Border Transport of Goods and People between Cambodia, Lao PDR, Thailand, Viet Nam; Ratification of Protocol on the special arrangement for sensitive and highly sensitive products of the Agreement on the Common Effective Preferential Tariff (CEPT) Scheme for the ASEAN Free Trade Area (AFTA).

2003: **Accession to WTO**

\* Law on Patents, Utility Models and Industrial Designs; \* Law on Copyright & Related Rights; \* Sub-decree on plant quarantine; \* Sub-decree on sanitary inspections of animal and animal products.

2004: \* Law on Procedural Amendments to Articles 1, 3, 9, 10, 11, 14, 17, 18, 20, 21, 22, 23, 24, 27, 29, 31, 33, 34, 35, 36, 37, 39, 40, 42, 43, 44, 45, 46, and 47 of the Law on the Establishment of an Extraordinary Chambers in the Court of Cambodia for Prosecuting Crimes Committed during the period of the Democratic of Kampuchea; \* Financial Law for Management in the Year 2004; \* Financial Law for Management in the Year 2005; \* Law on Granting Royal Titles and Prerogatives to Former King and Queen of the Kingdom of Cambodia; \* Law on the Additional Constitution for guarantee the regular process of National Institution; \* Law on the Royal Council of the Throne; \* Law on the Establishment of the Ministry of Labor and Vocational Training; \* Law on the Establishment of the Ministry of Social Welfare, Veterans and Youth Rehabilitation; \* Law on the Establishment of the Ministry of Women's Affairs;

\* Law on the Adoption of the Protocol on participation of Cambodian Membership in the World Trade Organization; \* Law on the Adoption of the Agreement Between the United National and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea.

2005: \* Law on Statistics; \* Law on Management of Weapons and Explosives; \* Law on Commercial Enterprises; \* Law on Prevention of Domestic Violence and Protection of Victims; \* Law on the Material to be exploitation and Money Settlement; \* Law on Procedural Amendments to Articles 2, 3, 4, 5, 6, 6, 9, 10, 14, 15, 17, 22 31 (New) 33, 40, 41, 48, 51, 55, 56, 58, 59, 60, 82 and 83 of the Internal Regulation of the National Assembly; \* Law on Amendments to Articles 88 and 111 (New) of the Constitution of the Kingdom of Cambodia; \* Law on the Prevention of Domestic Violence and the Protection of Victims; \* Amendment of Drug Control Law.

\* Law on the Adoption of the Convention on Chemical Weapons; \* Law on the Adoption of the Extradition Treaty between the Kingdom of Cambodia

and the People's Republic of Lao; \* Law on the Adoption of the Vienna Convention on Consulate Relations; \* Law on the Adoption of the United Nations Migration Constitution; \* Law on the Adoption of the Protocol of Amendment on Basic Agreement on ASEAN Industrial Cooperation Organization (AICO); \* Law on the Adoption of Cambodian Membership in the 1961 Single Convention on Drugs; \* Law on the Adoption of Cambodian Membership in the 1971 Single Convention on the element affecting to the Nerve System; \* Law on the Adoption on the participation of Cambodia in the United Nation Convention in 1988 against the illegal drug trafficking and the element affecting to the Nerve System; \* Law on the Adoption on the Agreement between the Royal Cambodian Government and the United State of American Government on the Non- providing of the Accused to the International Criminal Court; \* Law on the Adoption on the Cambodian Member of the Convention on Making of Plastic Explosives for the purpose of Detection; \* Law on the Adoption on the Cambodian Member of the International Convention for the Suppression of Terrorist Bombings; \* Law on the Adoption on the Cambodian Member of the International Convention against the taking of hostages; \* Law on the Adoption on the Cambodian Member of the Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents; \* Law on the Adoption on the Cambodian Member of the Convention on the Physical Protection of Nuclear Material; \* Law on the Adoption on the Cambodian Member of the Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf; \* Law on the Adoption on the Cambodian Member of the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation; \* Law on the Adoption on the International Convention Concerning the Prohibition and Immediate Action for the Eliminate of the Worst Forms of Child Labour; \* Law on the Adoption on Cambodian Membership of the United Nations Convention against Transnational Organized Crime; \* Law on the Adoption on the Cambodian Member of the Protocol Against the Smuggling of Migrants by Land, Air and Sea; \* Law on the Adoption on the Cambodian Member of the International Convention for the Suppression of the Financing of Terrorism; \* Law on the Adoption on the Protocol to

Amend the Framework Agreement on the Asian Investment; \* Law on the Adoption on the Agreement for the promotion and protection of investment between Cambodia and Netherlands; \* Law on the Adoption on the Agreement for the promotion and protection of investment between Cambodia and Vietnam; \* Law on the Adoption on the Supplementary Treaty between Cambodia and Vietnam on the delimitation of State Frontier in 1985; \* Law on the Adoption of Cambodian Membership in the Convention on Controlling Tobacco; \* Law on the Adoption of the Convention IX on Harmful Goods.

2006: \* Monogamy Law.

**to be updated**

2007: **to be updated**

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